

CORRECTED COPY

Supreme Court, U.S.
FILED

JUL 5 1979

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-20

FLAT GLASS ASSOCIATION OF JAPAN, *et al.*,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

Of Counsel:

TURNEY & TURNEY
7101 Wisconsin Avenue
Washington, D.C. 20014

KIM D. MANN
7101 Wisconsin Avenue
Washington, D.C. 20014
Counsel for Petitioners

July 5, 1979

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. The Decision Obviates CPSC's Duty To Make Jurisdictional Findings And Marshall Facts To Support Exercise Of That Jurisdiction	8
II. The Decision Conflicts In Principle With Recent Decisions Of The Fifth And First Circuits As To The Proper Interpretation Of 15 U.S.C. § 2058	11
CONCLUSION	15
APPENDIX [filed as separate volume]—	
Appendix A (Opinion of the Court of Appeals for the District of Columbia Circuit, January 31, 1979)	A1
Order of the Court Denying Petition For Re- hearing	A29
Appendix B (Federal Register notice of Consumer Product Safety Commission Standard for Archi- tectural Glazing Materials, January 6, 1977)	B1
Appendix C (Pertinent sections of Consumer Product Safety Act, 15 U.S.C. §§ 2051 <i>et seq.</i>	C1

TABLE OF AUTHORITIES

CASES:

Page

<i>American Petroleum Institute v. OSHA</i> , 581 F.2d 493 (5th Cir. 1978), <i>petition for cert. granted</i> , Feb. 21, 1979, — U.S. — (1979) (Nos. 911 and 1036, 1978 Term)	n.13, 13, n.14
<i>Aqua Slide 'N' Dive Corp. v. CPSC</i> , 569 F.2d 831 (5th Cir. 1978)	12, n.13, 13
<i>CPSC v. Anaconda Co.</i> , 593 F.2d 1314 (D.C. Cir. 1979)	4, 9, n.10, 10, n.12
<i>D. D. Bean & Sons v. CPSC</i> , 574 F.2d 643 (1st Cir. 1978)	12, n.13, 13, n.14, 14, n.15

STATUTORY PROVISIONS:

Consumer Product Safety Act, 15 U.S.C. §§ 2051 <i>et seq.</i>	
Section 3(a), 15 U.S.C. § 2052(a)	3, 4
Section 7, 15 U.S.C. § 2056	3, 4
Section 9, 15 U.S.C. § 2058	2, 3, 5, 6, 11
Section 11, 15 U.S.C. § 2060	3
28 U.S.C. § 1254(1)	2

ADMINISTRATIVE DECISIONS AND PROCEEDINGS:

42 Fed. Reg. 1427 <i>et seq.</i> (1977)	2, n.4, 5, n.7
43 Fed. Reg. 57254 (1978)	n.16
44 Fed. Reg. 31221 (1979)	n.16

MISCELLANEOUS:

Code of Federal Regulations	
16 CFR Part 1201	3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-20

FLAT GLASS ASSOCIATION OF JAPAN, *et al.*,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Flat Glass Association of Japan, *et al.*¹ respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia, entered January 31, 1979, affirming in part a safety standard promulgated by the Consumer Product Safety Commission ("CPSC").

¹ This petition is filed on behalf of the Flat Glass Association of Japan, Orient Glass, Inc., Sentinel Enterprises, Inc., Mitsubishi International Corporation, Seaply Glass Corporation, Construction Imports, Inc., Glasrep, and Glass International, Inc.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 593 F.2d 1323, appears as Appendix A, together with the Court's order of April 6, 1979, denying the petition for rehearing. The order of the CPSC, dated January 3, 1977, is published at 42 Fed. Reg. 1427 *et seq.* (January 6, 1977). That Federal Register notice appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals (Appendix A) was entered January 31, 1979. A timely petition for rehearing was denied April 6, 1979. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals for the District of Columbia Circuit properly sustain the Consumer Product Safety Commission's jurisdiction to promulgate a "consumer product" safety standard for a distinct building material not purchased by or for the personal use of consumers based on court-supplied factual inferences in lieu of agency-articulated findings exhibiting reasoned decision-making?

2. Did the Court of Appeals misinterpret section 9 of the Consumer Product Safety Act, 15 U.S.C. § 2058, when it affirmed a safety standard the Consumer Product Safety Commission promulgated without conducting a risk/benefit analysis to determine whether the "consumer product" presents an unreasonable risk which the safety requirements of the standard are reasonably designed to reduce or eliminate?

STATUTORY PROVISIONS INVOLVED

Sections 3(a), 7, 9, and 11 of the Consumer Product Safety Act, as amended ("CPSA"), 15 U.S.C. §§ 2052 (a), 2056, 2058, and 2060, are involved. The text of these statutory provisions as pertinent appears as Appendix C.

STATEMENT OF THE CASE

In January 1977, the Consumer Product Safety Commission promulgated a mandatory safety standard for architectural glazing materials following a rule-making proceeding under section 7 of the CPSA, 15 U.S.C. § 2056. The safety standard, codified at 16 C.F.R. Part 1201, prescribes impact performance standards for all types of glass intended for installation in six named components ("architectural products") of residential, commercial, school, and public buildings. See 593 F.2d at 1326 (App. A at A4-A5). Only glass certified as complying with the safety criteria may be installed in the six building components.

Wired glass, universally recognized and widely used since the Civil War as a reliable safety glazing material for architectural applications,² can not meet the new safety tests prescribed in the CPSC standard. It faces expulsion from the marketplace, driving manufacturers and distributors out of the business.³ Wired glass manufacturers instituted a proceeding in the Court of Appeals, invoking federal jurisdiction pursuant to 15 U.S.C. § 2060, to set aside the CPSC order. Petitioners challenged the CPSC's jurisdiction over wired glass, a build-

² Approximately 100,000,000 square feet have been installed in the past ten years.

³ A court-ordered stay postponed the demise of the wired glass industry pending the outcome of the lower court review. The Court of Appeals has not acted upon petitioners' request for stay of its mandate pending this Court's disposition of the petition for certiorari, although the mandate has not issued.

ing material, and the CPSC's lack of statutory findings mandated as a condition precedent to issuing the safety standard.

The CPSC has exercised its jurisdiction by issuing a safety standard for a non-residential building component that can not be purchased or used by consumers. Congress confined the CPSC to promulgating safety standards for "consumer products" only, 15 U.S.C. § 2056(a), and defined "consumer product" as any article, or component part of an article, produced or distributed for sale to or personal use of a consumer in or around a house, a school, in recreation, or otherwise. Specifically excluded as a "consumer product" is any article "not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer." 15 U.S.C. § 2052(a)(1). The Court of Appeals, citing its contemporaneous decision in a companion case, *CPSC v. Anaconda Co.*, 593 F.2d 1314 (D.C. Cir. 1979), ruled on review that "customarily" in the context of the statutory exclusion means more than occasionally and requires a jurisdictional showing that there is "... a significant marketing of the product . . . for sale to consumers or for the use of consumers. . . ." 593 F.2d at 1328 (App. A at A8).

Neither the standard nor the CPSC order promulgating the standard contains jurisdictional findings. Whether wired glass or architectural glazing materials generally are significantly marketed for sale to or use of consumers is not evident from the four corners of the standard or the CPSC's published preamble to the standard.⁴

⁴ The CPSC made only general statutory findings that the six architectural products into which glazing materials are incorporated are consumer products. 42 Fed. Reg. 1440 (App. B at B63). It made no findings, however, as to whether such glazing materials generally or wired glass specifically are marketed significantly to or for the use of consumers as distinct articles of commerce.

The Court of Appeals overlooked the lack of jurisdictional findings. It noted only that, in its view, the record substantiates the products covered by the standard are customarily marketed for sale to or the use of consumers, citing pages of a preliminary report by an outside consulting firm under contract to the CPSC that does not even discuss marketing of wired glass.⁵ 593 F.2d at 1328, n. 18 (App. A at A8).

Congress directed the CPSC to make specific findings in all standards with respect to the nature of the risk of injury the standard is designed to eliminate or reduce and "the approximate number of consumer products, or types or classes thereof, subject to such rule. . . ." 15 U.S.C. § 2058(c)(1). The CPSC must also find that each safety requirement in the standard is "reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product." 15 U.S.C. § 2058(c)(2).

The CPSC glass standard identifies the risks of injury the safety requirements are intended to reduce or eliminate: Lacerations resulting from walking or running into the glass, mistaking it for a door because the glazing is not visible; and lacerations resulting from accidentally falling into or through the glass. See 42 Fed. Reg. 1428, 1442 (1977) (App. B at B2-B3, B70). The standard

⁵ The Court of Appeals relies on a report entitled "Preliminary Industry Profile" prepared by Battelle Columbus Laboratories. The CPSC in its order makes no reference to this preliminary report. The pages cited, moreover, give only an overview of the glass industry's general channels of distribution. It contains no reference, explicit or implicit, to wired glass or to any role consumers may play in the sale or distribution of architectural glazing materials generally. In contrast, Battelle's *final* report, also of record (as pertinent, JDA. at 218-19), describes wired glass distribution as falling into three separate categories, each of which involves direct marketing between manufacturers or commercial outlets and either professional contract glaziers or industrial fabricators. None is sold to consumers, directly or indirectly.

purports to reduce or eliminate the risks by requiring glass installed in the six building components to break in an acceptable pattern when impacted with either 400 or 150 foot-pounds of kinetic energy, depending upon whether, in the CPSC's judgment, the glass size and location is likely to expose the consumer to a full-body contact.⁶

The CPSC, in compliance with 15 U.S.C. § 2058(c) (1), determined that wired glass is a separate, identifiable class or type of glazing material. It declined, however, to include in the standard any test criterion or other means of measuring or giving recognition to the deterrent effect on injuries of visual barriers or warnings, such as the wire mesh construction of wired glass, incorporated into glass installations. It concluded that wired glass can not meet either of the prescribed impact tests for safety in the standard and thus will be eliminated from the glazing market. In so doing, it failed to make findings, although required by 15 U.S.C. § 2058(c) (2), that compliance of wired glass with the impact requirements of the standard is reasonably necessary to reduce or eliminate an unreasonable risk of injury associated with that type of glazing material. It refused to evaluate the unique inherent safety feature of wired glass—its highly visible wire construction—as a means of reducing risks and ignored the absence of any relevant injury data to suggest an unreasonable risk exists.⁷ No tests were con-

⁶ The acceptable break pattern for wired glass requires the opening or hole in the glass, caused by the force of the test impactor (a 100-pound, shot-filled punching bag), to be so small the glass test specimen, in a horizontal position, will support a three-inch diameter four-pound steel ball placed on the opening.

⁷ Curiously, it analyzed other separate types of glazing materials to determine whether their special characteristics warranted exemption from the standard's requirements. See 593 F.2d at 1331, n.30 (App. A at A14); and 42 Fed. Reg. 1431-33, and 1435-36 (1977) (App. B at B16-B19, B21-B22, B24-B26, and B-40).

ducted to determine whether consumers are likely to impact wired glass installed in architectural products covered by the standard, given its wire mesh construction, or if an impact occurs, whether they are likely to be injured. Instead, the CPSC combed its files and bank of systematically collected injury data for evidence of a risk of injury associated with wired glass. It could turn up only one recorded wired glass injury since 1972 that it attributed to a risk of injury the CPSC's standard is designed to reduce or eliminate.⁸

On review, the Court of Appeals recognized that the unique physical properties and functions of wired glass separate it from the general class of glazing materials. Wired glass is, the Court observed, the only known transparent building material with qualified fire-retardant properties essential to meeting fire codes and contains a highly visible, permanently-bonded wire mesh construction that acts as a visual warning or barrier to unsuspecting consumers coming in contact with the glass. 593 F.2d at 1327, 1331-33 (App. A at A5, A15-A16, A18-A19). The Court agreed these unique features required the CPSC to accord that material special consideration. The Court thus ordered the CPSC on remand to re-evaluate subjecting wired glass to the standard's requirements, but only with regard to that material when installed as a fire barrier in compliance with fire codes and in large glass panels more than 48 inches from an entrance or exit door (a "non-adjacent panel").

The Court declined to order the CPSC to evaluate the effectiveness of the same unique features in reducing risks of injury associated with wired glass installed in other building locations, particularly in entrance/exit

⁸ See JA. 121-39, 168-205, 214-220, 241, 244, 272-73; JDA 245. This paucity of data led the CPSC's Bureau of Epidemiology to concede the evidentiary basis was lacking to subject wired glass to the standard. JA. 273.

doors and glass panels adjacent to such doors. The Court inferred from the CPSC decision that the CPSC had concluded visual barriers are effective risk-of-injury preventers only in non-adjacent glass panels." On the contrary, however, the CPSC itself failed to assess the effectiveness of visual barriers in connection with any type of glazing material installed in any of the six building components (other than large, non-adjacent glass panels) and specifically refused to evaluate the inherent visual warning effect of wired glass installed in *any* architectural product.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OBVIATES CPSC'S DUTY TO MAKE JURISDICTIONAL FINDINGS AND MARSHALL FACTS TO SUPPORT EXERCISE OF THAT JURISDICTION

The District of Columbia Circuit's opinion opens up a significant problem as to the efficacy of federal courts supplying jurisdictional findings not appearing in or otherwise apparent from CPSC orders under review. With other safety standards in various stages of promulgation, this Court should clearly delineate the appellate court's function in construing the statutory power of the CPSC and, in so doing, deter the jurisdictional overreach of the CPSC in subsequent rule-making proceedings.

The statute empowers the CPSC to regulate only "consumer products." It carefully carves out from the definition those products not customarily marketed for sale

⁹ The Court relied on the CPSC's decision to exempt non-adjacent glass panels from the standard when a bar or chair rail is fastened horizontally across the glass two to three feet above the floor. It found no other CPSC consideration of visual barriers in the standard. 593 F.2d at 1332-33 (App. A at A16-A18).

to or the personal use of consumers as distinct articles of commerce. The Court of Appeals has made the issue of CPSC jurisdiction to promulgate a safety standard for architectural wired glass, a distinct class of glazing materials, turn on the factual determination of pertinent marketing practices. The CPSC itself never addressed this issue, let alone reached the type of determination the Court has deemed controlling here. The Court, ignoring the crucial administrative void, has supplied its own findings, substituting its judgment for that of the CPSC. It concluded without explanation that the record substantiates that "the products covered by the safety standard are customarily marketed as distinct articles of commerce for sale to or for the use of consumers. . . ." 593 F.2d at 1328 (App. A at A8).¹⁰

The same Court of Appeals likewise held in *CPSC v. Anaconda, supra*, that marketing practices, ruled determinative of CPSC jurisdiction to issue an adjudicatory order for aluminum branch circuit wiring systems, must be decided first by the CPSC, which has the burden of proof on the issue of jurisdictional facts. The Court of Appeals remanded the case to the lower court for determining whether the CPSC had in the first instance made such findings and, if not, for referral back to the CPSC to carry out this task. 593 F.2d at 1322. The Court's action in these two cases is patently inconsistent.

Judicial usurpation of the administrative jurisdictional fact-finding function sets dangerous precedent especially

¹⁰ The significance of evidence to discern marketing practices emanates from the Court's holding in *CPSC v. Anaconda, supra*, that Congress did not intend the CPSC to regulate housing or all components of housing. Rather, Congress created only a limited federal role in the area of building construction so extensively regulated by local building codes. 593 F.2d at 1320. Thus, the *Anaconda* court ruled, only those housing components significantly marketed to consumers as distinct articles of commerce and apart from the purchase of the building itself could be regulated by the CPSC as "consumer products." 593 F.2d at 1321-22.

for review of orders from a federal agency bent on maximizing its self-proclaimed jurisdictional powers at the expense of congressional intent and the traditional role of local building codes in regulating construction. The CPSC's jurisdictional argument advanced in *Anaconda* demonstrates the necessity for holding the CPSC to its statutory obligation of making findings on the issue of jurisdiction over "consumer products" covered by its standard and developing facts in the record to support such findings. The *Anaconda* court sounded a note of alarm in paraphrasing the CPSC's unbridled interpretation of its jurisdiction over building materials and components:

[T]he Commission has taken the position that its jurisdiction extends to every component part of a dwelling including the central wiring and plumbing systems as well as the wall and flooring systems and various building components.

593 F.2d at 1320.¹¹

The Court rejected this expansive interpretation as inimical to congressional intent and the delicate balance of federal/state regulation.

The threat of an unlimited reach of CPSC jurisdiction over building components, if left unchecked, is real and imminent: A rule-making proceeding to develop consumer product safety standards for aluminum wiring systems is in the formative stages;¹² the CPSC has established a special department within the agency, titled "Household Structural Products," to deal with these and other building materials; and the data collection system of the CPSC has been re-programmed with a special category, "Home Structures and Construction Materials," to col-

¹¹ See also 593 F.2d at 1321, n.20.

¹² The Court of Appeals in *Anaconda* specifically declined to rule on whether aluminum wiring systems are "consumer products" for this purpose. 593 F.2d at 1322, n. 27.

lect injury information to support rule-making proceedings involving such "products."

A decision from this Court on the key issue of determining jurisdiction—whether the CPSC itself must specifically find the "consumer products" it proposes to regulate with a safety standard are marketed to consumers or whether the appellate court may supply these findings—is not only necessary to clarify the role of federal reviewing courts, but also to eliminate the prospect of vitiating protracted, expensive CPSC rule-making proceedings by subsequent judicial litigation of this issue.

The lower court's intrusion into the administrative jurisdictional fact-finding process sounds the knell for the wired glass industry. The CPSC has issued a standard wired glass can not possibly meet. Jurisdiction to issue the standard hinges on the factual question of marketing practices. The Court of Appeals has simply assumed without justification that wired glass is significantly marketed to consumers. The Court is plainly wrong. The record itself so demonstrates. The only evidence bearing on the issue establishes conclusively that wired glass is not sold or otherwise distributed to consumers. JDA at 218-19. *See supra* at n.5.

II

THE DECISION CONFLICTS IN PRINCIPLE WITH RECENT DECISIONS OF THE FIFTH AND FIRST CIRCUITS AS TO THE PROPER INTERPRETATION OF 15 U.S.C. § 2058

Section 9(c)(2) of the CPSA, 15 U.S.C. § 2058(c)(2), provides that the CPSC may not promulgate a safety standard unless it finds the requirements of the standard are "reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product." Three recent Courts of Appeals decisions have interpreted

this provision (one, an OSHA provision deemed identical), reaching the same conclusion regarding CPSC's burden to assess the nature of the risk and the reasonableness of the safety requirements. This conclusion conflicts with the treatment the District of Columbia Circuit has accorded the same section of the CPSC in this proceeding.¹³

The Fifth Circuit in *Aqua Slide* held the CPSC must demonstrate by substantial evidence that each requirement in its safety standard is reasonably necessary to eliminate or reduce an unreasonable risk of injury and conversely that an unreasonable risk of injury is associated with each product which the standard seeks to eliminate or reduce. The *Aqua Slide* court expressed the relationship between "unreasonable risk" and "reasonably necessary" as follows:

The necessity for the standard depends upon the nature of the risk, and the reasonableness of the risk is a function of the burden a standard would impose on a user of the product.

569 F.2d at 839.

The Fifth Circuit recognized the reasonableness of the identified risk, and thus the necessity for the standard, is directly related to the remoteness of the risk. 569 F.2d at 840. The First Circuit in *D. D. Bean* expanded upon this connection, finding that the statutory term "unreasonable risk" contemplates only real, not speculative, risks and only risks that are appreciable and unnecessary. On this issue, the First Circuit stated the CPSC must bear the burden of "demonstrating the existence

¹³ The three conflicting decisions are *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831 (5th Cir. 1978); *D. D. Bean & Sons v. CPSC*, 574 F.2d 643 (1st Cir. 1978); and *American Petroleum Institute v. OSHA*, 581 F.2d 493 (5th Cir. 1978), *petition for cert. granted*, Feb. 21, 1979, — U.S. — (1979) (Nos. 911 and 1036, 1978 Term). The First and Fifth Circuits in *D. D. Bean* and *American Petroleum*, respectively, cite and rely heavily on *Aqua Slide*.

of such a risk before proceeding to regulate." 574 F.2d at 650-51, citing *Aqua Slide* and the legislative history of the CPSC. Similarly, in *American Petroleum*, the Fifth Circuit held that OSHA must demonstrate the asserted reality of the identified risk has some factual basis bottomed on substantial evidence. 581 F.2d at 505.¹⁴

Thus, under the principles of *Aqua Slide*, *D. D. Bean*, and *American Petroleum*, whether impact tests banning wired glass are reasonably necessary depends upon the likelihood of lacerative injury resulting from consumer contact with wired glass installed in doors and panels. In evaluating the likelihood of injury, and thus the reasonableness of the risk, the wire mesh construction of the glass and its history of injury-free use must be taken into account, as well as the fact compliance with the standard will force wired glass from the marketplace, leaving the public without a fire-retardant glazing material and with only plastics to meet the need for expeditious replacement of broken glass.

The Court of Appeals' decision is in irreconcilable conflict with these principles. It does not inquire whether the CPSC, in subjecting wired glass to the standard's impact criteria, conducted a risk/benefit balancing test. It declined to inquire whether the CPSC attempted to measure the remoteness of risk of injury associated with wired glass. Had the Court conducted such review, it would have discovered the CPSC never assessed the risk

¹⁴ While *American Petroleum* involved review of an OSHA standard, the Court there relied on its prior holding in *Aqua Slide*, equating the statutory duties of OSHA and CPSC to conduct risk analyses to determine the reasonableness of the safety requirements vis-à-vis the nature of the risks of injury the requirements seek to reduce. Petitioners understand the Fifth Circuit's disposition of the risk analysis requirement is a principal ground urged for granting the petitions to this Court to issue a writ of certiorari in the *American Petroleum* case. The petitions were granted February 21, 1979, and opening briefs have been filed.

of injury associated with wired glass, separate and apart from glazing materials generally, installed in any covered architectural product. It would have found the CPSC never questioned, with regard to any architectural product, whether permanently affixed visual warnings sufficiently reduce risks associated with wired glass (or any other type of glazing material) to the point the remaining risk may no longer be deemed "unreasonable."¹⁵ In failing to follow *D. D. Bean*, the Court had to speculate that the CPSC did consider and consciously rejected the effectiveness of visual warnings in reducing injuries associated with adjacent glazed panels and the other five architectural products covered by the standard. In fact, however, the CPSC has never given the issue any such consideration, at least at the time the standard was promulgated.¹⁶

¹⁵ No record evidence will support such determination. Despite its best efforts, the CPSC could not find any supportive injury data for wired glass and could not marshal any other empirical data to establish consumers are likely accidentally to impact wired glass installed in doors and adjacent panels with sufficient force to break the glass and incur the type of injury the standard is designed to eliminate. Lack of significant injury data or other empirical evidence in *D. D. Bean* deprived the standard's delay ignition requirement of the substantial evidence necessary to sustain its promulgation. The Court was unable to find the risk was appreciable. 574 F.2d at 650.

¹⁶ Subsequent CPSC action, brought to the Court of Appeals' attention in filings with the petition for rehearing and accepted into the record by order of that Court (App. A at A28) did recognize the effectiveness of visual warnings in other glazed architectural products—of stained and patterned glass installed in doors and adjacent panels, 43 Fed. Reg. 57254 (1978), and of horizontal chair rails fastened across clear glazed panels adjacent to doors, 44 Fed. Reg. 31221 (1979).

CONCLUSION

For the foregoing reasons, petitioners, Flat Glass Association of Japan *et al.*, respectfully request this Court to issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Of Counsel:

TURNERY & TURNERY
7101 Wisconsin Avenue
Washington, D.C. 20014

KIM D. MANN

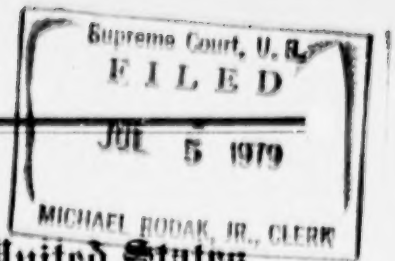
7101 Wisconsin Avenue
Washington, D.C. 20014

Attorney for Petitioners

Flat Glass Association of Japan
Orient Glass, Inc.
Sentinel Enterprises, Inc.
Mitsubishi International
Corporation
Seaply Glass Corporation
Construction Imports, Inc.
Glasrep
Glass International, Inc.

July 5, 1979

79-204



IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

FLAT GLASS ASSOCIATION OF JAPAN, *et al.*,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

TURNER & TURNER
7101 Wisconsin Avenue
Washington, D.C. 20014

KIM D. MANN
7101 Wisconsin Avenue
Washington, D.C. 20014
Counsel for Petitioners

July 5, 1979

TABLE OF CONTENTS

	Page
Appendix A (Opinion of the Court of Appeals for the District of Columbia Circuit, January 31, 1979)	A1
Order of the Court denying Petition For Re-hearing	A29
Appendix B (Federal Register notice of Consumer Product Safety Commission Standard for Architectural Glazing Materials, January 6, 1977)	B1
Appendix C (Pertinent sections of Consumer Product Safety Act, 15 U.S.C. §§ 2051 <i>et seq.</i>)	C1

A1

APPENDIX A

[1323]

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

ASG INDUSTRIES, INC., *et al.*,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

FLAT GLASS ASSOCIATION OF JAPAN, *et al.*,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

Nos. 77-1216, 77-1238

Argued May 5, 1978

Decided Jan. 31, 1979

As Amended Feb. 6, 1979

[1325] Petitions for Review of Orders of the Consumer
Product Safety Commission.

Eugene L. Stewart, Washington, D.C., for petitioners
in No. 77-1216.

Kim D. Mann, Washington, D.C., for petitioners in
No. 77-1238.

Benjamin P. Schoen, Atty., Dept. of Justice and Alan
H. Schoem, Atty., Consumer Product Safety Commission,
Washington, D.C., with whom Charles R. McConachie

and Edward B. Craig, IV, Attys., Dept. of Justice, Washington, D.C., were on brief, for respondent.

Before BAZELON, LEVENTHAL and ROBB, Circuit Judges.

Opinion for the Court filed by LEVENTHAL, Circuit Judge.

LEVENTHAL, Circuit Judge:

In this case we consider a petition by manufacturers of wired glass to review the Safety Standard for Architectural Glazing Materials¹ promulgated by the Consumer Product Safety Commission ("CPSC" or the "Commission") pursuant to section 7 of the Consumer Product Safety Act ("CPSA" or the "Act").² They assert jurisdictional and substantive challenges to the validity of the safety standard as applied to their product, but their petition does not claim any procedural infirmity in the

¹ 16 C.F.R. § 1201 (1978).

² Pub. L. No. 92-573, 86 Stat. 1207 (1972), as amended by Pub. L. No. 94-284, 90 Stat. 503 (1976) (codified at 15 U.S.C. §§ 2051-81 (1976)). CPSA § 7(a)(1), 15 U.S.C. § 2056(a)(1) (1976), provides:

The Commission may by rule, in accordance with this section and section 2058 of this title, promulgate consumer product safety standards. A consumer product safety standard shall consist of one or more of any of the following types of requirements:

(A) Requirements as to performance, composition, contents, design, construction, finish, or packaging of a consumer product.

(B) Requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions.

Any requirement of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product. The requirements of such a standard (other than requirements relating to labeling, warnings, or instructions) shall, whenever feasible, be expressed in terms of performance requirements.

safety rule, which [1326] was issued after extensive comment and consultation.³

I. BACKGROUND

The safety standard prescribes impact-performance requirements that must be met by glazing materials⁴ intended for use in any of the following architectural products: doors, including storm doors, combination doors,

³ Review of a safety standard by this court is authorized by CPSA § 11, 15 U.S.C. § 2060 (1976). The administrative process was initiated in June, 1973, when the Consumer Safety Glazing Committee ("CSGC"), an ad-hoc group of industry, labor and general interest organizations, petitioned the Commission under CPSA § 10 to commence a proceeding for the development of a consumer product safety standard designed to address the hazards associated with architectural glass. In November of that year the Commission granted CSGC's petition on the basis of information submitted by that group, consideration of injury data reported by the National Electronic Injury Surveillance System, and review of data and information gathered by the National Commission on Product Safety. In May, 1974, pursuant to CPSA § 7, 15 U.S.C. § 2056 (1976), the Commission published a notice of proposed rulemaking and solicited offers to formulate a consumer product safety standard as required by the Act. 39 Fed. Reg. 18502 (1974). Four offers were received and two existing voluntary standards were submitted. In August, 1974, the Commission announced its acceptance of CSGC's offer to develop a standard to encompass architectural glazing materials. 39 Fed. Reg. 30191 (1974). In February, 1976, the Commission published the proposed standard for public comment. 41 Fed. Reg. 6178 (1976). In January of 1977, the consumer product safety standard involved in this case was promulgated, 42 Fed. Reg. 1441 (1977). It was amended in June and December of that year, 42 Fed. Reg. 31166, 61860 (1977).

⁴ 16 C.F.R. § 1201.2(a)(11) (1978) provides:

"Glazing material" means plastics, glass, including annealed glass, organic-coated glass, tempered glass, laminated glass, wired glass; or combinations thereof where these are used:

(i) In openings through the architectural products listed in § 1201.1(a), or

(ii) As the architectural products themselves, e.g., glazed panels or unframed doors.

and patio-type sliding glass doors; bathtub or shower doors and enclosures; and glazed panels.⁵ Section 1201.2 of the standard divides affected products into two categories.⁶ "Category II products" are those that contain at least one piece of glazing material that exceeds 9 square feet in surface area, as well as all shower or bathtub enclosures and all patio-type sliding glass doors. The performance standard requires that glazing materials for use in Category II products, when subjected to an impact of 400 foot-pounds of kinetic energy delivered by a test apparatus described in the standard, must either not break, or break with one of several acceptable breakage characteristics. All other products subject to the standard are "Category I products," and need only survive impacts of 150 foot-pounds of kinetic energy.⁷

Subsection 1201.1(c) provides special exemptions for various products.⁸ One is temporary. It suspends until

⁵ 16 C.F.R. § 1201.1(a) (1978). The standard also prescribes environmental durability requirements, from which wired glass is exempted (§ 1201.4, table 1), as well as labeling requirements, which are not material to this case.

⁶ 16 C.F.R. § 1201.2(a)(3), (4) (1978). The classification is based on "the expectation of whether in normal use or during reasonably foreseeable misuse [the products] will be subjected to high energy or low energy impact and whether it is likely that an individual's full body will be involved in the impact." 42 Fed. Reg. 1429 (1977).

⁷ See 16 C.F.R. § 1201.4(e)(1) (1978); 42 Fed. Reg. 1434 (1977).

⁸ The following products, materials, and uses are exempted by the subsection:

(1) Wired glass used in doors or other assemblies to retard the passage of fire, where such door or assembly is required by a federal, state, local or municipal fire ordinance, except that this exemption shall terminate on January 6, 1980.

(2) Louvers of jalousie doors;

(3) Openings in doors through which a 3 inch diameter sphere is unable to pass;

[Footnote continued on page A5]

January 6, 1980, application of the standard to "[w]ired [1327] glass used in doors or other assemblies to retard the passage of fire, where such door or assembly is required by a federal, state, local or municipal fire ordinance." Although one type of glazing material is often an acceptable substitute for another,¹⁰ wired glass used in fire doors and other fire-retardant barriers seems to be an exception. Petitioners submit, apparently without contest, that wired glass is the only transparent construction material that neither shatters, ignites nor produces dangerous fumes when exposed to the extreme temperatures produced by a major fire. The visibility afforded by the material allegedly offers advantages to both firefighters and persons seeking escape from a fire. Thus it is preferred to opaque construction materials and commonly is required by statute for such uses.¹¹ The Commission conceded when the safety standard was issued that neither wired glass nor an acceptable substitute could then be produced that would both exhibit the fire-retardant characteristics required by fire codes and satisfy the safety standard; but the Commission expressed confidence that

⁸ [Continued]

(4) Leaded glass panels where no individual piece of glass has an area greater than 30 square inches;

(5) Glazing materials used as curved glazed panels in revolving doors;

(6) Commercial refrigerated cabinet glazed doors.

16 C.F.R. § 1201.1(c) (1978).

⁹ 16 C.F.R. § 1201.1(c)(1) (1978). This deferral of the effective date for special uses of wired glass is reiterated in section 1201.7, which otherwise specifies July 6, 1977, as the effective date of the standard. 16 C.F.R. § 1201.7 (1978). Since the standard will apply to all uses of wired glass without further Commission action, all of the issues raised by petitioners are currently ripe for review.

¹⁰ See 16 C.F.R. § 1201.1(d)(3)(i) (1978).

¹¹ See 42 Fed. Reg. 1430 (1977); ASG Industries Brief at 24-27 (quoting from various submissions to the Commission).

the necessary technology could be developed during the deferral period, *i.e.*, between the 1977 issuance and January 6, 1980.¹² Petitioners object to the application of the standard to wired glass intended for any use, but assert a particular objection to the application of the standard to wired glass used in fire doors and other fire-retardant barriers.

II. DEFINITION OF "CONSUMER PRODUCT"

The Commission's jurisdiction to promulgate consumer product safety standards, though comprehensive in certain respects, is circumscribed by the Act's complex definition of "consumer product." Petitioners argue that architectural glazing materials, and in particular wired glass, belong to a category of construction materials that are not encompassed by the definition, and thus fall outside the Commission's jurisdiction.¹³

In *CPSC v. Anaconda Co.*, 190 U.S.App.D.C. —, 593 F.2d 1314 (D.C. Cir. 1979), decided this day, we examined the scope of the term "consumer product." The statutory definition provides in part:¹⁴

The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—

¹² 42 Fed. Reg. 1430 (1977).

¹³ Brief of Flat Glass Assoc. of Japan at 10-16.

¹⁴ CPSA § 3(a)(1), 15 U.S.C. § 2052(a)(1) (1976).

(A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer.

A consumer product may be "any article, or component part thereof." The term "article" was intended to refer to a distinct article of commerce, as opposed to any physical entity that might exist at an intermediate stage of production. *Anaconda, supra*, at — - —, 593 F.2d at 1314-1322. The reason for the phrase "or component part thereof" was to enable the Commission to regulate just a part of a consumer product if only such regulation were warranted.¹⁵ Thus a product may [1328] qualify as a "consumer product" if it either is produced or distributed as a distinct article of commerce (and fulfills the other definitional requirements), or is produced or distributed as a component part of such a distinct article. *Id.* As we brought out in *Anaconda*, clauses (i) and (ii) of the definition were designed to ensure that the term "consumer product" would encompass the various modes of distribution through which consumers acquire products and are exposed to the risks of injury associated with those products—not only direct sale transactions, covered by clause (i), but also any lease, promotional gift, or purchase by an institution, for consumer use, covered by clause (ii). *Id.* at — - —, 593 F.2d at 1314-1322.

A consumer product must be used or intended for use "in or around a permanent or temporary household or residence, a school, in recreation, or otherwise." This enumeration of locations and activities in which a consumer product may be used is not a limitation on jurisdiction, but rather an assurance of comprehensiveness.¹⁶

¹⁵ S. Rep. No. 92-835, 92d Cong., 2d Sess. 7 (1972) U.S. Code Cong. & Admin. News 1972, p. 4573; *Anaconda, supra*, at —, 593 F.2d at 1314.

¹⁶ See *CPSC v. Chance Mfg. Co.*, 441 F.Supp. 228, 231-34 (D.D.C. 1977) (the phrase "in recreation, or otherwise" does not restrict the

Other provisions of the definition exclude from the commission's jurisdiction certain uses of products that would otherwise qualify as consumer products.¹⁷

The foremost limitation on the core definition of "consumer product" specifies a requirement that the product must be "customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer." As we discussed in *Anaconda*, a product must be "customarily"—not just occasionally—produced or distributed for the use of consumers. Jurisdiction does not require a showing that a majority of product-sales are to consumers, but there must be a significant marketing of the product as a distinct article of commerce for sale to consumers or for the use of consumers before the product may be considered as "customarily" produced or distributed in that manner. *Id.* at ———, 593 F.2d at 1314-1322.

The record before the court substantiates that the products covered by the safety standard are customarily marketed as distinct articles of commerce for sale to consumers or for the use of consumers in or around a household or residence, a school, in recreation, or otherwise.¹⁸ Thus they qualify as "consumer products."

III. PREEMPTIVE JURISDICTION UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT

Petitioners argue that the Commission is deprived of authority over architectural glazing materials used in

locations where consumer products are used to residences and schools).

¹⁷ CPSA § 3(a)(1)(B)-(H), 15 U.S.C. § 2052(a)(1)(B)-(H) (1976).

¹⁸ JA at 58a-58q ("Research Report on Analysis of the Architectural Glass Field and the Potential Impact of New Standards Regulating the Use of the Product—Manufacturing and Distribution").

most non-residential buildings by the terms of CPSA § 31, which provides in part:¹⁹

The Commission shall have no authority under this chapter to regulate any risk of injury associated with a consumer product if such risk could be eliminated or reduced to a sufficient extent by actions taken under the Occupational Safety and Health Act of 1970.

The Occupational Safety and Health Act ("OSHA")²⁰ assigns authority to the Secretary of Labor ("Secretary"), who has delegated administration to the Occupational Safety and Health Administration of the Department of Labor. The legislative history reveals that CPSA § 31 was not intended to preclude the exercise of jurisdiction by CPSC whenever a product-hazard either potentially could be or was in part being regulated under OSHA. Congress re- [1329] quired CPSC to make a judgment. The Conference Committee Report outlined the pertinent considerations:²¹

¹⁹ 15 U.S.C. § 2080 (1976).

²⁰ 29 U.S.C. §§ 651-78 (1976).

²¹ H.R. Rep. No. 92-1593, 92d Cong., 2d Sess. 38 (1972), U.S. Code Cong. & Admin. News, 1972, pp. 4573, 4630. In the Senate version of the bill (S. 3419), a product-hazard fell outside the Commission's jurisdiction if the product was "subject to safety regulations" under OSHA. The Senate Commerce Committee Report explained that this phrase referred to actual, not potential, regulation of the product. S. Rep. No. 92-749, 92d Cong., 2d Sess. 12-13 (1972). Under the House version of this provision (now CPSA § 31), even if the product is being regulated under OSHA, the Commission has authority if there has not been sufficient reduction or elimination of the risk of injury. The House approach was adopted by the Conference Committee. H.R. Rep. No. 92-1593, *supra*, at 38.

We need not consider whether the Commission's authority may be negated if there exists potential but unexercised authority under OSHA to sufficiently reduce a risk of injury within the Secretary's jurisdiction.

In determining whether a risk of injury can be reduced to a sufficient extent under [OSHA], it is anticipated that the Commission will consider all aspects of the risk, together with the remedial powers available to it under . . . the bill and the remedial powers under [OSHA] available to the agency administering the law.

We find that the Commission acted reasonably in determining that the risk of injury associated with architectural glazing materials could not be reduced "to a sufficient extent" under OSHA and thus required regulation under CPSA. Due to the nature of the problem associated with architectural glazing materials—an inadequacy in the structural properties of the product—a reduction in the product-hazard sufficient for the effective protection of consumers can be achieved only by regulation of the manufacturing process. Under OSHA, which is designed to provide a safe working environment, the Secretary may not act directly against a manufacturer of an unsafe product unless that product poses a hazard to the manufacturer's employees.²² Obviously even a safe place of manufacture, organized to protect employees fully, may be engaged in the production of items that will be dangerous to consumers.

Petitioner Flat Glass Association objects that "[t]here are no findings" on this issue. Brief at 23. The statute does not require "findings" on this point, as it does on the subjects embraced by CPSA § 9, which specifies the procedures governing promulgation of a consumer product safety rule.²³ While Flat Glass argues that this is a matter of "jurisdiction," the statute speaks in terms of

²² See 29 U.S.C. §§ 655(b)(1) (procedure for promulgation, modification, or revocation of standards), 651 (congressional statement of findings and declaration of purpose and policy), 654(a) (duties of employers), 658(a) (citations; authority to issue) (1976).

²³ 15 U.S.C. § 2058 (1976). See section VI *infra*.

a limit on the Commission's "authority." Flat Glass states that there were "specific written public comments challenging CPSC's jurisdiction on this very point (Rec. Doc. No. 705, n.3)." *Id.* However, it has not included the cited document in the Joint Appendix, and the citation to a footnote in that document raises the question in the court's mind whether the Commission was fairly alerted that a serious question was being raised along these lines.²⁴ Certainly the court would be more comfortable if the Commission's determination were express and not merely implicit. But even in an adjudicatory proceeding an agency cannot reasonably be asked to dot all "i's" and cross all "t's."²⁵

We have taken into account that the Secretary of Labor may have authority to regulate use of architectural glazing materials in places of employment. However, assuming that the Commission's regulation were modified to remove sales to places of employment, Flat Glass does not suggest that it would be feasible for a manufacturer to establish a separate area or process to be used for glass destined for industrial or commercial use. In our view, the scope of the regulation as it stands has not been effectively impeached. If there is or should arise a matter of substance, such as a showing that differentiation of glass intended for use in places of employment is feasible at the manufacturing level, and that

²⁴ See *Alianza Federal de Mercedes v. FCC*, 176 U.S.App.D.C. 253, 259-60, 539 F.2d 732, 738-39 (1976). We have examined the footnote cited in the Flat Glass Brief. The only reference to OSHA is in the following two sentences: "Congress never intended the Commission to regulate the safety of 'products' used in commercial or industrial establishments. Such jurisdiction was given to OSHA exclusively." Apart from the inaccuracy of the view expressed, this is hardly the kind of comment that can be expected to bring forth a well-reasoned agency response, buried as it was among thousands of pages of submissions.

²⁵ *WAIT Radio v. FCC*, 135 U.S.App.D.C. 317, 320, 418 F.2d 1153, 1156 (1969).

regulation under OSHA would sufficiently reduce the risk of injury to employees, a petition to amend would be ripe for consideration.²⁶

IV. INCLUSION OF WIRED GLASS IN A SAFETY STANDARD ENCOMPASSING ARCHITECTURAL GLAZING MATERIALS

Petitioners assert that the functional and risk characteristics of wired glass are dissimilar from those of the other glazing materials covered by the safety standard. In particular petitioners allege (A) that wired glass resists breakage when subjected to substantial impacts, and that when wired glass fractures it presents a minimal risk of injury due to the breakage characteristics of the material—producing shards with right angles as opposed to acute angles; (B) that the wire embedded in the glass increases the product's visibility, thus reducing the risk of inadvertent collision; and (C) that wired glass exhibits unique functional advantages when employed in fire doors and other assemblies designed to retard the passage of fire. Petitioners argue that these factors so differentiate wired glass from other architectural glazing materials that it is unreasonable for the product to be covered by the same safety standard. Certain aspects of this argument have merit.

The problem requires an examination of the Commission's authority to treat a range of similar products as a single product class. Without this authority, products of nearly identical design, composition, and function, but of different manufacture or brand-name, would have to be treated individually by the Commission, which would find itself entangled in needlessly repetitive investigation, rule-making and adjudication. On the other hand, if the

²⁶ *Compare Investment Co. Institute v. Federal Reserve Board*, 179 U.S.App.D.C. 311, 322, 551 F.2d 1270, 1281 (1977).

Commission could consider all products with similarities of design or composition as comprising a single product class, then one safety standard might unreasonably encompass a range of products that did not present remotely similar risks of injury or serve similar functions. The concepts of function and risk are pervasive in the statutory scheme. Products may be treated as a group if they exhibit a sufficient similarity of functional and risk characteristics. The task of evaluating these factors to determine product classifications is committed primarily to the judgment of the Commission.²⁷ However, the Commission has a responsibility to justify application of the standard to a product or product-use that, according to the facts elicited in the course of rulemaking, exhibits significantly dissimilar functional or risk characteristics when compared with the other products covered by the standard.²⁸ That responsibility obtains at least where, as here, the product accounts for a significant quantum of usage. The administrative record must reflect that the Commission has determined by reasoned decision- [1331] making either (1) that the product presents no significantly dissimilar functional or risk characteristics pertinent to the objectives of the standard; or (2) that despite significant differences, application of the standard to the product remains "reasonably necessary to prevent

²⁷ CPSA § 9(c)(1), 15 U.S.C. § 2058(c)(1) (1976), provides in part:

(1) Prior to promulgating a consumer product safety rule, the Commission shall consider, and shall make appropriate findings for inclusion in such rule with respect to—

* * * *

(B) the approximate number of consumer products, or types or classes thereof, subject to such rule;

²⁸ *Bunny Bear, Inc. v. Peterson*, 473 F.2d 1002, 1006-07 (1st Cir. 1973). See *Automotive Parts & Accessories Assn., Inc. v. Boyd*, 132 U.S.App.D.C. 200, 208, 407 F.2d 330, 338-43 (1968) (agency has obligation to respond adequately to well-considered objections to proposed rule).

or reduce an unreasonable risk of injury associated with such product"—the ultimate test of a safety rule's appropriateness.²⁹ The Commission has engaged in this evaluation process for a number of products that have been excluded from the standard.³⁰ We look to the record to determine whether the inclusion of wired glass reflects reasoned decisionmaking.

A. Consideration of Breakage Characteristics

Petitioners allege that wired glass resists breakage better than other glazing materials and that when wired glass fractures it presents less of a hazard than other products covered by the standard. Even if these claims are correct,³¹ they do not require the exemption of wired glass from the safety standard. The Commission has determined that to avoid an unreasonable risk of injury associated with architectural glazing materials, such materials must not break, or must break with one of several acceptable breakage characteristics, when subjected to the impacts specified in the standard.³² So long as the impact-performance standards comply with the statutory

²⁹ See CPSA § 7(a)(1), 15 U.S.C. § 2056(a)(1) (1976); CPSA § 9(c)(2)(A), 15 U.S.C. § 2058(c)(2)(A) (1976).

³⁰ See, e.g., 42 Fed. Reg. 1430 (1977) (windows and transoms); *id.* at 1431 (louvers in jalousie doors); *id.* (commercial refrigerated-cabinet doors); *id.* (garage doors); *id.* at 1431-32 (curved glazed panels of revolving doors); *id.* at 1432 (leaded glass).

³¹ There is some evidence in the record that the impact and breakage characteristics of wired glass are not superior to those of other glazing materials. For example, tested specimens of wired glass failed to survive impacts of 100 foot-pounds of kinetic energy and, when broken, produced shards with acute angles. JDA at 168, 171-75 (impact-test results for wired glass).

³² See 16 C.F.R. § 1201.4(e)(1) (1978). The Commission considered incorporating in the standard an included-angle breakage criteria for plastics, but determined that an appropriate included-angle standard could not be formulated from the available information. 42 Fed. Reg. 1436 (1977).

requirements,³³ it is irrelevant to judicial review whether the failure of wired glass to meet the standards is by a narrow or by a wide margin. The administrative function embraces such line-drawing even though this exercise of discretion inevitably results in some "near-misses."

B. Consideration of the Enhanced Visibility of Wired Glass

Petitioners allege that the Commission has failed to evaluate as a basis for exemption the contention that the wire embedded in the glass increases the product's visibility, thus reducing the risk of inadvertent collision. The definition of one category of "glazed panels" manifests a Commission determination that the unreasonable risk of injury associated with that product-use results from the possibility that a victim will mistake a glazed panel for an open passageway. However, with respect to all other products covered by the standard—doors, bathroom enclosures, and panels that are closely associated with doors—the Commission apparently has concluded that an unreasonable risk of injury arises from collisions occurring even when the victim is aware of the presence of the barrier but the extent or the nature of the impact is unexpected due to slipping, stumbling or other mishap.³⁴ Enhanced visibility is obviously a [1332] dissimi-

³³ CPSA § 7(a)(1), 15 U.S.C. § 2056(a)(1) (1976), specifies that each requirement of a safety standard "be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with [the consumer product(s) covered by the standard]." CPSA § 9(c)(2)(A), 15 U.S.C. § 2058(c)(2)(A) (1976), requires that the Commission make such a finding and incorporate it in the rule. CPSA § 11(c), 15 U.S.C. § 2060(c) (1976), requires that this finding be "supported by substantial evidence on the record taken as a whole." See discussion in section VI *infra*.

³⁴ This conclusion may be gleaned from the applicability of the standard to products composed of "glazing material," defined by subsection 1201.2(a)(11) to include "glass." Glass, in turn, is defined by subsection 1201.2(a)(9) to include opaque and translucent

larity, but with respect to all but one product-use the characteristic is not pertinent to the risk that concerns the Commission. The standard, like the pertinent risk, applies to such products irrespective of their visual characteristics.

The visibility of a product is a critical consideration under the standard with respect to a particular category of glazed panels. We refer to subsection 1201.2(a)(10), which defines the term. The text is somewhat complicated and appears in the margin.³⁵ The key point is that

glass. Thus opaque and translucent—i.e., fully visible—products are subject to the standard. Only subsection 1201.2(a)(10)(iv)(B) manifests an intention to exclude from the safety standard products that are highly visible.

³⁵ 16 C.F.R. § 1201.2(a)(10) (1978) provides:

(10) "Glazed panel" means a glazing material used in any building listed in § 1201.1(b) that is:

(i) In residential buildings, any piece of operable or nonoperable glazing material adjacent to a door whose nearest vertical edge is within 12 inches (31 centimeters) from the door in a closed position, and whose bottom edge is below the level of the top of the door; or

(ii) In all buildings other than residential buildings, any piece of operable or nonoperable glazing material adjacent to a door whose nearest vertical edge is within 48 inches (1.2 meters) from the door in a closed position and whose bottom edge is below the level of the top of the door; or

(iii) In all buildings other than residential buildings, all panes not described in paragraph (a)(10)(ii) of this section where:

(A) The lowest edge of the glazing material is less than 18 inches (46 centimeters) above any floor or any walking surface; and

(B) The exposed glazing material in such panel exceeds 9 square feet (0.3 square meters); and

(C) There is a walking surface on both sides, either of which is within 36 inches (92 centimeters) of such panel and the horizontal planes of such walking surfaces are within 12 inches (31 centimeters) of each other.

(iv) Not included in the definition of glazed panels are:

[Footnote continued on page A17]

the Commission has made distinctions in terms of whether visual awareness of a panel will obviate the unreasonable risk of injury. The definition of glazed panel in paragraph (iii) consists of specifications that may be summarized briefly as relating to instances where the glazing material has a bottom edge close to the floor, is sufficiently large that it conceivably could be a passageway, and there is a walkway on both sides. These characteristics define a situation in real life where a person would have the impression of an open passageway before him and might be unaware that he was confronted by a solid barrier. The Commission's purpose is revealed by paragraph (iv)(B), which excludes from the definition of glazed panel those panels described in paragraph (iii) that have "a horizontal member such as a piece of the framing or permanent chair rail" located to operate as a visual barrier. The Commission's comments accompanying the safety standard explicate its intention:³⁶

PPG Industries commented on § 1201.2(a)(10)(iv)(B) of the standard which exempts from the standard panels that have a visual barrier in the form of a horizontal member such as a piece of framing or a permanent chair rail of specified dimensions and location. PPG objected to this exemption on the grounds that this section does not provide for an adequate physical barrier.

³⁵ [Continued]

(A) Panels where an intervening interior permanent wall is between the door and the panel(s) described in paragraph (a)(10)(ii) of this section:

(B) Panels described in paragraph (a)(10)(iii) of this section that have a horizontal member such as a piece of the framing or permanent chair rail no less than 1½ inches (4 centimeters) in width, which is located between 24 and 36 inches (61 and 91 centimeters) above the walking surface.

³⁶ 42 Fed.Reg. 1429-30 (1977).

One of the modes of injury associated with glazed panels is that of the person who walks or runs into the glazed panel because he/she fails to see the glazing and believes that the area is a passageway—an open door. The standard is designed to reduce or eliminate this mode of injury by providing for the use of a visual barrier when safety glazing is not used. Therefore, the Commission has not accepted the change recommended by PPG [1333] because the Commission does not intend the horizontal member to be a physical barrier.

The Commission regards visual awareness as a critical factor with respect to the category of glazed panels defined in paragraph (iii). This is clear from the exclusion in paragraph (iv) (B). But the administrative record does not demonstrate that the Commission has evaluated the visual characteristics of wired glass in the context of the exclusion. Hence, we remand to the Commission for reconsideration of this matter.³⁷

C. *Consideration of the Functional Advantages of Wired Glass in Fire Doors*

We turn to petitioners' objection to the application of the standard to wired glass used in fire doors and other fire retardant barriers. For these product-uses, wired glass apparently exhibits functional characteristics unique among transparent construction materials. It allegedly does not shatter, ignite nor produce dangerous fumes when exposed to the extreme temperatures produced by a major fire. When intense heat causes a wired-glass panel to crack, the embedded wire maintains the structural

³⁷ We do not require the Commission to exclude from the standard wired-glass panels defined in subsection 1201.2(a)(10)(iii), but there must be consideration of the matter and reasoned decisionmaking. On remand, the Commission also would have latitude to reconsider, e.g., whether to include translucent and opaque glazed panels within the exclusion of paragraph (iv) (B). See note 34 *supra*.

integrity of the product thus retarding the spread of fire. As compared with opaque construction materials, wired glass offers important advantages. Firefighters can peer through a wired-glass panel before entering a potentially lethal enclosure. A glazed panel in a fire door enables a firefighter to gain some measure of protection behind the door while battling a fire on the other side. Such uses of wired glass also afford potentially life-saving visibility to victims of fires seeking escape from a burning structure and to their rescuers as well.

The administrative record presents a substantial showing that these product-uses of wired glass exhibit functional characteristics significantly different from the other glazing materials and product-uses encompassed by the safety standard.³⁸ The record does not reveal a process of reasoned decisionmaking by which the Commission has concluded that these uses of wired glass should be included within the standard. We remand for reconsideration of this question.

We do not require the Commission to exempt wired glass employed in fire doors and related fire-retardant barriers. It may determine on remand (1) that this particular product-use presents no significantly dissimilar functional characteristics pertinent to the objectives of the standard; or (2) that despite significant differences, application of the standard to the product-use remains reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product. What we do require is reasoned decisionmaking on these matters.

The Commission's deferral of the standard's effective date does not resolve the problem. Indeed, this deferral embodies an acknowledgment of the unique functional advantages of wired glass used in fire-retardant barriers and a tacit admission that application of the standard at

³⁸ See 42 Fed.Reg. 1430-31 (1977).

this time to such uses of the product is not reasonably necessary to eliminate or reduce an unreasonable risk of injury.

The underlying issue relates to the Commission's authority to employ technology-forcing standards. The Commission's basic authority to prohibit characteristics that render a product unreasonably hazardous has a technology-advancing consequence; once an external requirement is mandatory, industry will strive for cost-efficient compliance. But application of a safety rule is not dependent on technological advance; the sale of a hazardous article may be prohibited even if attainment of the required [1334] standard is not feasible because technology will not yield a safe product.³⁹ There is also a technology-advancing purpose in the statutory provision that requires the Commission to articulate its requirements in terms of performance "whenever feasible;" the use of performance criteria rather than specifications for composition or design gives industry freedom and motivation to develop the structures and processes that most effectively meet the safety requirements.⁴⁰

The need of the public is a matter the Commission is directed to consider in deciding whether a safety standard is "reasonably necessary to eliminate or reduce an unreasonable risk of injury." Some hazards that may interdict a product for which there is no substantial public need may be compatible with continued production and sale of a product for which there is a substantial public need.⁴¹

³⁹ See CPSA § 8, 15 U.S.C. § 2057 (1976) (CPSC authority to ban a hazardous product for which there is no feasible safety standard).

⁴⁰ CPSA § 7(a)(1), 15 U.S.C. § 2056(a)(1) (1976); see S.Rep. No. 92-749, 92nd Cong., 2d Sess. 30 (1972).

⁴¹ See CPSA § 9(c)(1)(C), 15 U.S.C. § 2058(c)(1)(C) (1976); S.Rep. No. 92-749, 92nd Cong., 2d Sess. 6 (1972).

In the case of wired glass used in fire-retardant barriers, the Commission has apparently found a public need sufficient to counterbalance the risk of injury. This explains why it did not make the standard effective forthwith.⁴² The Commission stated that it did not have sufficient information to determine whether wired glass intended to retard the passage of fire and complying with the impact-performance standards was technologically feasible when the regulation was issued.⁴³ The regulation as issued must be appraised on the assumption that the required technology is not now available.

The Commission predicates application of new requirements for the manufacture of wired glass on the projection that there will be a sufficient technological advance during the deferral period to provide a product that both satisfies the public need for safety in case of fire (by complying with fire codes), and yet avoids unreasonable risk of injury in ordinary non-fire usage (by complying with the standard).⁴⁴ The question is the validity of a safety rule based on a technology projected for emergence in the future.

Certainly the government may seek technological advances. It may contract and may make grants to stimulate such advances, that are dependent on technological advances,⁴⁵ or that are dependent on the exploitation of an invention. Indeed, Congress may provide that technological advance is a condition for continuation of law-

⁴² There is no indication that the Commission found an unreasonable risk of injury associated with wired glass used in fire doors and related fire-retardant barriers, but delayed the effective date of the safety rule solely to soften the economic impact on manufacturers.

⁴³ 42 Fed.Reg. 1430 (1977).

⁴⁴ *Id.*

⁴⁵ See CPSA § 5(b), (c), 15 U.S.C.A. § 2054(b), (c) (1976).

ful manufacture.⁴⁶ However, the direction given by Congress to the Commission is a direction to define "unreasonable risk" in light of need and feasibility, with consideration for the avoidance of economic disruption.⁴⁷ In our view, the Commission's authority to predicate a finding of unreasonable risk on the projection of technological advance occurring in the future requires that the agency have some basis in its records and files supporting the projection as meaningful and reasonable, as contrasted with mere speculative desire. The records and files before us on this appeal are utterly devoid of such a demonstration.

In general, a safety standard must take effect within 180 days of publica- [1335] tion.⁴⁸ The 180-day limitation may be exceeded if "the Commission finds, for good cause shown, that a later effective date is in the public interest and publishes its reasons for such finding."⁴⁹ This authority confers broad discretion on the Commission. The Commission has deferred the effective date for certain products that satisfy specified intermediate safety standards. This deferral was designed to facilitate a transition with a minimum of economic disruption to the new standard set in the interest of consumer safety.⁵⁰ In an appropriate case, an agency may defer the effective date of a regulation just as a court may defer the effective date of a decree enjoining a nuisance,⁵¹ provided there is justification. However, the requirement of reasoned decisionmaking has vitality as to such deferral

⁴⁶ See *International Harvester Co. v. Ruckelshaus*, 155 U.S.App. D.C. 411, 478 F.2d 615 (1973).

⁴⁷ CPSA § 9(c)(1)(D), 15 U.S.C. § 2058(c)(1)(D) (1976).

⁴⁸ CPSA § 9(d), 15 U.S.C. § 2058(d) (1976).

⁴⁹ *Id.*

⁵⁰ 16 C.F.R. § 1201.7(b), (c) (1978); see 42 Fed.Reg. 31164-66 (1977). See note 42 *supra*.

⁵¹ *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975).

measures.⁵² Where, as here, the reasoning rests on a major premise of technological advance, the agency must either have support for that premise or establish a procedure that may be invoked, in the event the projection does not materialize, without disaster to the manufacturers who in good faith seek advance yet are unsuccessful. An ultimate result that sale of an item will be prohibited if there has been no technological advance must rest on an unconditioned, outright determination of unreasonable risk of injury.

The Commission may have been intending some kind of further consideration when the deferral period neared its conclusion. Taking the record as it stands, we deem it appropriate to suspend application of the safety standard to uses of wired glass required by fire ordinances, and to remand to the Commission for further consideration and explication.⁵³

⁵² *Environmental Defense Fund, Inc. v. EPA*, 179 U.S.App.D.C. 43, 57, 548 F.2d 998, 1012 (1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2199, 53 L.Ed.2d 239 (1977).

⁵³ The Commission would also have latitude to provide for other exemptions. *E.g.*: (a) Expanding the implicit exemption from the impact-performance standards for panels of wired glass through which a three-inch-diameter sphere will not pass. See 16 C.F.R. § 1201.4(e)(1)(i) (1978). The Commission has determined that such a small opening does not present an unreasonable risk of injury. 42 Fed.Reg. 1431 (1977). Upon reconsideration, the Commission may conclude that somewhat larger panels of wired glass will provide the functional advantages of that product as a fire retardant material without an unreasonable risk of injury. (b) The Commission's finding that approximately one-half of all injuries occur to small children aged 14 and under, 16 C.F.R. § 1201.1(d)(1)(iii) (1978), presents the possibility of significant reduction of risk through specification of a minimum height for wired-glass panels in fire doors.

V. THE STANDARD'S FAILURE TO SPECIFY A MANUFACTURER'S TESTING PROGRAM

CPSA § 14 provides for product certification and labeling. Each manufacturer of a product that is subject to a safety standard must:⁵⁴

issue a certificate which shall certify that such product conforms to all applicable consumer product safety standards, and shall specify any standard which is applicable. . . . [Any such certificate] shall be based on a test of each product or upon a reasonable testing program.

The safety standard for architectural glazing materials specifies the tests that must be satisfied, but does not prescribe a testing program to be followed by manufacturers. Petitioners argue that this omission renders the standard as a whole impermissibly vague. We disagree.

Each product subject to the safety standard must satisfy its requirements.⁵⁵ [1336] Manufacturers have the responsibility under CPSA § 14 to develop a reasonable testing program or to test each product to ensure compliance. Petitioners do not claim that the detailed requirements of the safety standard are vague or ambiguous. The Commission has discretion to prescribe a manufacturers' testing program.⁵⁶ However, manufacturers cannot complain that the Commission's willingness to accept their compliance in reasonable good faith automatically renders the safety standard impermissibly vague.

⁵⁴ CPSA § 14(a)(1), 15 U.S.C. § 2063(a)(1) (1976).

⁵⁵ 16 C.F.R. § 1201.3(a) (1978), provides:

All glazing materials to which this standard applies . . . shall meet the impact and environment test requirements [of the standard].

⁵⁶ See CPSA § 14(b), 15 U.S.C. § 2063(b) (1976).

VI. THE FINDINGS REQUIRED BY CPSA § 9(c)

CPSA § 9(c), set out in the margin, requires that the Commission establish a predicate of factual determinations before promulgation of a consumer product safety rule.⁵⁷ Subsection 11(c) of the Act specifies that a safety standard may not be validated on judicial review unless the court finds that each of the subsection 9(c) determinations is "supported by substantial evidence on the record

⁵⁷ CPSA § 9(c), 15 U.S.C. § 2058(c) (1976), provides:

(c) Findings for inclusion in rules; required findings

(1) Prior to promulgating a consumer product safety rule, the Commission shall consider, and shall make appropriate findings for inclusion in such rule with respect to—

(A) the degree and nature of the risk of injury the rule is designed to eliminate or reduce;

(B) the approximate number of consumer products, or types or classes thereof, subject to such rule;

(C) the need of the public for the consumer products subject to such rule, and the probable effect of such rule upon the utility, cost, or availability of such products to meet such need; and

(D) any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety.

(2) The Commission shall not promulgate a consumer product safety rule unless it finds (and includes such finding in the rule)—

(A) that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product;

(B) that the promulgation of the rule is in the public interest; and

(C) in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product.

taken as a whole.”⁵⁸ In considering the petitioners’ arguments, we have adverted to the substance of the findings required by subsection 9(c)—evaluation of the risk of injury, definition of the relevant product classes, consideration of the public need for the product, avoidance of unnecessary economic disruption, and the conclusion that the safety rule is reasonably necessary to eliminate or reduce an unreasonable risk of injury and is in the public interest. A fair reading of the petition challenging application of the safety standard to wired-glass products reveals that there is no serious challenge to the evidentiary support for the rule with respect to product-uses for which wired glass exhibits no significant dissimilarity of function or risk when compared to other affected products. The major thrust of petitioners’ arguments is that the Commission must particularize the findings required by CPSA § 9(c) for each product-use of wired glass. As we have indicated, however, no particularized findings are required to the extent that wired-glass products are properly included in the product class that encompasses other glazing materials. It would be premature to evaluate the record support for application of the safety rule to those wired-glass products that are the subject of our remand. But with respect to the product-uses not governed by the remand, we have examined the administrative record and [1337] find that there is substantial evidence for each of the findings required by CPSA § 9(c).⁵⁹

⁵⁸ 15 U.S.C. § 2060(c) (1976). See *Aqua Slide ‘N’ Dive v. CPSC*, 569 F.2d 831, 837-38 (5th Cir. 1978) (discussing in detail the considerations relevant to application of the substantial-evidence standard to the legislative-type record of a CPSC rulemaking proceeding); see also *D. D. Bean & Sons Co. v. CPSC*, 574 F.2d 643 (1st Cir. 1978).

⁵⁹ See JA at 65-77m (“Hazard Analysis: Injuries Involving Architectural Glass”); JDA at 36-63 (“Analysis of the Architectural Glass Field and the Potential Impact of New Standards Regulating the Use of the Product”); *id.* at 283-93 (memorandum of Robert

We conclude with discussion of the contention that, given the existing and foreseeable state of technology in the wired-glass industry, either the product will be unable to comply with the safety standard or compliance will result in an uncompetitive price. Thus, it is alleged that to the extent wired-glass products become subject to the safety rule, economic realities will result in the industry’s destruction and that such a result would render the safety standard unreasonable. We deem it appropriate to consider this contention, for to the extent that it is held to be valid it bears on the remand proceeding. We find that a severe impact on the industry would be a relevant factor but would not be conclusive.

One of the primary motivations for the enactment of CPSA was the perceived failure of the market mechanism to reflect adequately the costs of injuries associated with consumer products and thus provide the incentive necessary if industry were to improve product safety without government regulation.⁶⁰ In economic parlance, manufacturers and distributors were externalizing some of the social costs associated with consumer

Kurtz regarding the estimated distribution of glazing materials for various types of products within the standard); *id.* at 427-506 (“Final Report: Economic and Environmental Subcommittee of the Architectural Glass Project Consumer Safety Glazing Committee”); *id.* at 216-34 (“Brief Profile and Preliminary Economic Impact Analysis on Wire Glass and Plastic Glazing”); *id.* at 321-22 (“Probable Effect of the Standard on the Utility and Availability of the Products and the Need of the Public for the Products Subject to the Standard”); *id.* at 312-13, 384-85 (“Probable Effects of the Standard on Cost to Consumers”); *id.* at 36-63, 85-159, 216-34, 332-55 (analyses of economic impact by Battelle Columbus Laboratories); *id.* at 305-22, 377-96 (economic impact analysis by the Commission’s Bureau of Economic Analysis); *id.* at 427-506, 516-40 (economic information compiled by the Consumer Safety Glazing Committee); JA at 141, 142-45, 332 (support for technical findings on which the standard’s performance requirements were based); JDA at 203, 206-07, 208-14, 508-15 (same).

⁶⁰ S.Rep. No. 92-749, 92d Cong., 2d Sess. 2-5 (1972).

products, a toll in physical injury and human suffering that was only imperfectly recompensed by the payments associated with existing tort law and insurance. One of the principal functions of CPSA is to promulgate safety rules that have the effect of compelling the internalization of these costs to the extent required to meet performance and other safety standards. Internalization of costs previously disregarded by manufacturers will likely result in a rise in cost and price, and may constrict or eliminate the demand for a particular product as consumers substitute products that offer the desired utility at the lowest price. Such an outcome would not be contrary to the intent of Congress so long as the agency has given reasoned consideration to all the pertinent factors and has made the requisite findings supported by substantial evidence. A severe economic impact on an industry, or on a significant segment of an industry, would be a material factor in appraising the reasonableness of a rule, but it cannot, in and of itself, be held to render a safety rule unreasonable.

Affirmed in part; remanded in part for further consideration.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 77-1238

FLAT GLASS ASSOCIATION OF JAPAN, ET AL.,
Petitioners

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent

And Consolidated Case No. 77-1216

[Filed April 6, 1979]

BEFORE: Bazelon, Leventhal, and Robb; Circuit
Judges

ORDER

Upon consideration of the petition for rehearing, including appendices, lodged in the Clerk's Office by petitioner Flat Glass Association of Japan, it is

ORDERED, by the Court, that the Clerk is directed to file said petition, with appendices, and to enter same on the docket. And it is

A30

FURTHER ORDERED, by the Court, that petitioner's
aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

B1

APPENDIX B

FEDERAL REGISTER

THURSDAY, JANUARY 6, 1977

PART V

[SEAL]

CONSUMER PRODUCT SAFETY COMMISSION

ARCHITECTURAL GLAZING MATERIALS

Establishment of Safety Standards

[1428] Title 16—Commercial Practices

CHAPTER II—CONSUMER PRODUCT SAFETY COMMISSION

PART 1201—SAFETY STANDARD FOR ARCHITECTURAL GLAZING MATERIALS

Establishment of Standard

In this document, the Consumer Product Safety Commission issues a consumer product safety standard for architectural glazing materials (16 CFR Part 1201), effective July 6, 1977 except for wired glass used in doors or other assemblies to retard the passage of fire where such doors or other assemblies are required by a federal, state, local or municipal fire ordinance, for which the standard is effective January 6, 1980, as provided in § 1201.7 of this Part 1201. The standard is intended to reduce the unreasonable risks of injury associated with architectural glazing materials by ensuring that the glazing materials used in certain architectural products either do not break when a certain energy, or break with characteristics that are less likely than other glazing materials to present an unreasonable risk of injury.

The injuries this standard is designed to reduce or eliminate are as follows:

A. Lacerations, contusions, abrasions, and other injury or death resulting from walking or running into glazed doors or sliding glass doors believed to be open or glazed panels mistaken as a means of ingress or egress, or pushing against glazing material in doors or glazed panels in an attempt to open a door.

B. Lacerations, contusions, abrasions, and other injury or death resulting from accidentally falling into or through glazing material in doors, sliding glass doors,

glazed panels, bathtub doors and enclosures and shower doors and enclosures.

C. Lacerations, contusions, abrasions, and other injury or death resulting from the act of installing, replacing, storing or otherwise manipulating glazing material in doors, sliding glass doors, glazed panels, bathtub doors and enclosures and shower doors and enclosures, or from broken glass in doors, sliding glass doors, glazed panels, bathtub doors and enclosures and shower doors and enclosures.

Copies of all the documents, data, information relative to the original petition for a standard, the Commission's decisions thereon and other materials reviewed and considered by the Commission and/or the staff, in connection with the development of the proposed standard and the final standard, or otherwise mentioned in this notice are available for public inspection in the Office of the Secretary, 1111 18th Street, N.W., 3rd Floor, Washington, D.C. 20207.

I. BACKGROUND

On June 20, 1973, the Consumer Safety Glazing Committee (CSGC) petitioned the Commission under section 10 of the Consumer Product Safety Act (15 U.S.C. 2059) (hereinafter referred to as CPSA or act) to commence a proceeding for the development of a consumer product safety standard to address the hazards associated with architectural glass. CSGC is an ad hoc group of industry, labor and general interest groups initially formed in 1968 for the purpose of drafting and lobbying for passage of a Model Safety Glazing bill in the various states.

On November 1, 1973, the Commission granted the CSGC's petition on the basis of information submitted by CSGC, consideration of injury data reported by the National Electronic Injury Surveillance System (NEISS),

and review of data and information gathered by the National Commission on Product Safety.

Thereafter, the Commission commenced a proceeding under section 7 of the act (15 U.S.C. 2056) to develop a consumer product safety standard applicable to architectural glass by publishing a notice in the FEDERAL REGISTER of May 28, 1974 (39 FR 18502). In the proceedings prior to publication by the Commission in the FEDERAL REGISTER of the proposed standard on February 11, 1976 (41 FR 6178), the product covered by the standard was referred to as "architectural glass". Commencing with the publication of the proposed standard, the designation of the product was changed to "architectural glazing materials". The change was made because the term "architectural glazing materials" includes materials that may consist in whole or in part of materials other than glass. As indicated in the notice of proceeding, the Commission had intended the standard to cover glass and non-glass glazing materials.

In the notice of proceeding, the Commission preliminarily determined (1) that hazards associated with architectural glass present unreasonable risks of injury or death and (2) that one or more consumer product safety standards are necessary to eliminate or reduce those unreasonable risks of injury. The notice included an invitation to interested persons to submit offers to develop a recommended safety standard, or to submit an existing standard as a proposed product safety standard.

Four offers were received and two existing voluntary standards were submitted in response to the notice of proceeding. In the FEDERAL REGISTER of August 21, 1974 (39 FR 30191), the Commission announced its acceptance of a CSGC offer to develop a recommended standard. CSGC submitted a recommended standard to the Commission on January 24, 1975.

On February 11, 1976, the Commission published a proposed standard in the FEDERAL REGISTER (41 FR 6178) for public comment in accordance with sections 7 and 9 of the CPSA (15 U.S.C. 2056 and 2058). The proposed standard was designed to reduce or eliminate the unreasonable risks of injury associated with architectural glazing materials by ensuring that the glazing materials used in certain architectural products either do not break when impacted with a certain energy or break with characteristics that are less likely than other glazing materials to cause an unreasonable risk of injury. The proposed standard is basically the standard which was recommended by CSGC with certain revisions, additions, and deletions made by the Commission's staff in response to direction by the Commission.

A more complete discussion of the Commission's consideration of the CSGC recommended standard, the rationale for the changes made in that standard and a description of the provisions of the proposed standard were set forth in the preamble of the proposal of February 11, 1976. A discussion of the preliminary determination of unreasonable risk associated with architectural glazing materials, and a discussion of the technical rationale which formed the basis for the Commission's proposal of the standard were also set forth in that preamble.

In the FEDERAL REGISTER of April 15, 1976 (41 FR 15873), the Commission announced the extension of the period by 60 days, or until June 11, 1976, in which it must either issue a final consumer product safety standard for architectural glazing materials, or withdraw the notice of proceeding. In the FEDERAL REGISTER of July 7, 1976 (41 FR 27952), the Commission announced a further extension of this period until December 1, 1976, due to the complexity and variety of the technical issues raised in the public record requiring staff review and analysis.

II. DESCRIPTION OF THE STANDARD

The standard, 16 CFR Part 1201 published below, prescribes safety requirements for glazing materials manufactured after its effective date for use in storm doors, doors used for human passage (both exterior and interior), shower and bathtub doors and enclosures, certain glazed panels, and sliding or patio-type doors. The standard also requires that the architectural products enumerated above which incorporate glazing materials and which are manufactured after the effective date of the standard be constructed with glazing materials that meet the requirements of the standard. Thus, the glazing materials and architectural products incorporating those glazing materials manufactured after the effective date of the standard must meet the requirements of the standard.

While the standard issued below prescribes a test method to determine whether glazing materials subject to the standard meet the requirements of the standard, the standard itself does not require that a manufacturer test any glazing materials or products subject to the standard issued below to determine whether materials are required to perform testing under section 14 of the Consumer Product Safety Act (15 U.S.C. 2063) which prescribes certification requirements. The Commission will establish regulations regarding certification by a separate rulemaking proceeding. However, the Commission intends to use the test procedures set forth in the standard issued below to determine whether materials and products subject to the standard meet the requirements of the standard.

[1429] The standard is designed for residential and certain nonresidential applications. It does not cover glazing materials used in the manufacture and construction of architectural products not identified in the stand-

ard such as (but not necessarily restricted to) prime windows and storm windows.

After the effective date of the standard, no person shall manufacture for sale, offer for sale, distribute in commerce or import into the United States glazing material or the enumerated products incorporating glazing materials subject to the standard which do not comply with the requirements of the standard.

For purposes of this standard, fabricators (persons who assemble or otherwise incorporate glazing materials into the architectural products identified) are considered to be manufacturers as defined in § 1201.2(a)(15) and (16) of the standard and sections 3(a)(4) and 3(a)(8) of the act (15 U.S.C. 2052(a)(4) and (a)(8)). Distributors and retailers of glazing materials (including persons cutting glazing materials to size) are also subject to the standard. The effective date for the standard is July 6, 1977, except for wired glass used in doors or other assemblies to retard the passage of fire, where such doors or other assemblies are required by a federal, state, local or municipal fire ordinance, for which the standard is effective January 6, 1980 as provided in § 1201.7 of this Part 1201.

The standard, Part 1201 below, is designed to reduce or eliminate the unreasonable risks of injury associated with architectural glazing materials by ensuring that the glazing materials used in certain architectural products either do not break when impacted with a certain energy or break with characteristics that are less likely than other glazing materials to present an unreasonable risk of injury. The standard is basically the standard which was proposed by the Commission with certain revisions, additions, and deletions made in response to the comments submitted on the proposal by interested persons. The major provisions of Part 1201, and the principal differences from the proposed standard are described

below. The Commission provides further explanations for the changes and addresses comments on the proposed standard under Section III of the preamble entitled "Response to the Proposal."

A. *Impact tests.* In § 1201.2 of the standard, affected products are defined and divided into two categories according to the expectation of whether in normal use or during reasonably foreseeable misuse they will be subjected to high energy or low energy impact and whether it is likely that an individual's full body will be involved in the impact. Included in the final standard is a revision in the definition of Category I and Category II doors and glazed panels. The dividing line is now 9 square feet rather than 6 square feet. (§ 1201.2(a) (3) and (4) below). Section 1201.4(d) (1) describes the impact tests for both categories. The requirements for impact kinetic energy of 150 foot pounds for Category I products (impact from a drop height of 18 inches) and 400 foot pounds for Category II products (impact from drop height of 48 inches) have been retained in the final standard.

B. *Breakage characteristics.* The standard, at § 1201.4 (e) (1), provides that glazing materials when impacted as required must either not break, or break with one of a series of alternative acceptable breakage characteristics. These breakage characteristics are similar to the ones proposed, but have been revised as described below.

1. For reasons detailed in Section III(C) (2) (a) (3) of this preamble, § 1201.4(e) (1) (i), which describes a criterion for passing the impact test, has been revised to specify the period of time that a sphere should remain on the glazing material after it has been placed in a horizontal position.

2. Also for reasons detailed in Section III(C) (2) (c) (2) of this preamble, § 1201.4(e) (1) (ii), which describes

a criterion for passing the impact test, has been revised by deleting the term "crack free" and by adding a definition of the term "particle" for purposes of this section. The purpose of these changes is to require that large shards having cracks that terminate in the shard be considered in determining the 10 largest pieces to be selected.

3. The standard does not require, as a criterion for passing the impact test, that glazing meet an included angle criterion. The Commission's position on this matter is further detailed in section III(C) (2) (d) of this preamble.

C. *Environmental durability tests.* Section 1201.4(a) (2) of the standard requires that accelerated or simulated weathering tests be conducted to ensure environmental durability of the glazing materials.

1. Section 1201.4(d) (2) (i) of the proposed standard specified a boil test procedure which included a first soak and a second soak (immersion) of test specimens. This requirement has been retained in that section of the final standard since the standard sets forth the manner in which the Commission will test for compliance with the standard. The first soak may be made optional for manufacturers of glazing materials in the Commission's certification testing program which will be published in another document. This is further discussed in part III (C) (3) (a) (1) of this preamble.

2. Section 1201.4(b) (3) (ii) regarding the simulated weathering test has been revised to eliminate the use of the carbon arc test equipment and to specify the type of xenon arc test equipment that will be used by the Commission to determine compliance with the standard. This is also further discussed in part III(C) (3) (a) (2) of this preamble.

D. *Glazed panel definition.* The definition of "glazed panel" included in §§ 1201.2(a) (10) (i) and 1201(a) (10)

(ii) of the standard has been revised to exclude transoms by restricting the definition of glazed panels to those " * * * whose bottom edge is below the level of the top of the door * * *". This addition clarifies that transoms and other glazed panels beginning above door level are not included within the standard.

E. *Exemptions of Part 1201.* Certain product exemptions to this Part 1201 have been included in § 1201.1 (c) of the standard. The rationales for such exemptions are detailed in section III (A) of this preamble.

The Commission has deferred the applicability of the standard to wired glass used in doors or other fire assemblies to retard the passage of fire where such doors or other assemblies are required by a federal, state, local, or municipal fire ordinance for 2½ years from the effective date of the standard. A total exemption from the requirements of the standard has been provided for the louvers of jalousie doors as that term is defined in § 1201.2(a)(12). Non-complying glazing materials may be used in any door opening provided that a 3-inch diameter sphere cannot pass through the opening. This Part 1201 does not apply to the curved sidelights of revolving doors. Decorative leaded glass is excluded from the provisions of Part 1201 when no individual pane is greater than 30 square inches in area. Commercial refrigerated glass cabinet doors are also exempted. The basis for these exemptions is explained in section III (A) of this preamble.

III. RESPONSE TO THE PROPOSAL

In response to the proposal of February 11, 1976, fifty-four written comments were received. In addition, a proceeding to receive oral comments was held on March 8, 1976, at the offices of the Commission in Washington, D.C. Oral comments were made by representatives

of eight organizations. The principal issues raised by the comments and the Commission's conclusions thereon are set forth below. Significant revisions in the final standard resulting from the comments and/or Commission decisions are also discussed.

In addition, eight individual consumers expressed their approval of the Commission's action to increase the safety of architectural glazing materials and to reduce the number of injuries connected with architectural glazing products. One consumer expressed disapproval of a testing standard and recommended a labeling standard instead.

A. *Scope and application; exemptions.* A number of comments were received relating to § 1201.1 which deals with the scope and application of the proposed standard and the ancillary § 1201.2 setting forth definitions of terms used in the proposed standard.

1. *Glazed panels.* a. PPG Industries commented on § 1201.2(a)(10)(iv)(B) of the standard which exempts from the standard panels that have a visual barrier in the form of a horizontal member such as a piece of framing or a permanent chair rail of specified dimensions and location. PPG objected to this exemption on the grounds that this section does not provide for an adequate physical barrier.

One of the modes of injury associated with glazed panels is that of the person [1430] who walks or runs into the glazed panel because he/she fails to see the glazing and believes that the area is a passageway—an open door. The standard is designed to reduce or eliminate this mode of injury by providing for the use of a visual barrier when safety glazing is not used. Therefore, the Commission has not accepted the change recommended by PPG because the Commission does not intend the horizontal member to be a physical barrier.

b. The Federal Housing Administration (FHA) of the Department of Housing and Urban Development suggested in a comment that the Commission narrow the allowable range of heights for this visual barrier, i.e., 18 to 36 inches above the walking surface, because a single barrier at the 18 inch level might contribute to the severity of injury.

The Commission agrees that a barrier at 18 inches may be ineffective as a visual barrier and, in addition, may present a hazard of tripping. The Commission, therefore, has raised the minimum level to 24 inches for this visual barrier. The new range would continue to afford protection to children as well as adults, as a visual barrier, while reducing the risk of tripping by adults. Therefore, the Commission has revised the definition of glazed panel as contained in § 1201.2(a)(10)(iv)(B) to exempt from coverage as glazed panels those panels in nonresidential buildings which are not adjacent to doors and which have horizontal members located between 24 and 36 inches above the walking surface.

FHA also suggested an exemption for glazed panels having a painted stripe or design as a visual barrier. However, paint is not permanent and is easily omitted during construction or retrofit. Therefore, the request is denied.

2. *Windows and transoms.* The Flat Glass Marketing Association (FGMA) stated that there is no economic or empirical justification for excluding windows from the scope of a standard and yet, including those windows and transoms which are close enough to a door to come within the definition of a glazed panel as contained in § 1201.2(a)(10) of the standard.

Only when a window falls within the definition of a glazed panel does it come within the scope of the standard. The risks of injury associated with glazed panels

include lacerations, contusions, abrasions, and other injuries and death resulting from walking or running into glazed panels mistaken as a means of ingress or egress, pushing against glazed panels in an attempt to open a door (e.g., when distracted while intending to open a door), or accidentally falling into or through glazed panels. The risks of injury from windows in general are lacerations, contusions, abrasions and other injuries and death resulting from falling against, opening, closing, washing or otherwise handling windows.

When the window falls within the definition of glazed panel as used in this standard, it is associated with the risks of injury from glazed panels as well as the risks of injury associated with windows in general. The purpose of including such windows in the standard is to address the risks of injury associated with glazed panels and not windows in general. The Commission will continue to encourage further efforts to reduce injuries associated with windows. The Commission will continue to review information available concerning injuries associated with windows and the technological practicability of developing a standard for that product and may, in the future if warranted, initiate a standard development proceeding relative to windows.

The comment on windows from FGMA appears to be based in part on the belief that the Commission intended that transoms be included within the scope of the proposed standard. This was not the Commission's intent. The location of the customary above-the-door transom, usually more than 6 feet above the walking surface, would generally forestall the specified risks of injury associated with architectural glazing materials to which the proposed standard was addressed. In addition, there were no injuries related to transoms discovered in a review of the Commission's investigative reports and a potential for injury does not appear to exist. Thus, a transom

whose bottom edge is above the top of the door is not included in the standard. Accordingly, §§ 1201.2(a)(10)(i) and 1201.2(a)(10)(ii) have been revised to clarify that such transoms are excluded from the standard.

3. *Wired glass in fire assemblies.* Comments relative to the treatment to be accorded glazing used in fire doors were submitted by CSGC; Doorlite Producers Association; Flat Glass Association of Japan; Chairman, Committee on Fire Doors and Windows, National Fire Protection Association (NFPA); C-E Glass Co.; and the American Insurance Association. They recommended, in effect, that wired glass used in fire doors be exempt from the provisions of the standard or, in the alternative, be tested at an impact level of 100 foot pounds or less rather than the 150 or 400 foot pounds levels established in § 1201.4(d)(1) of the standard.

For the most part, the glazing used in fire doors is $\frac{1}{4}$ inch wired glass. Several of the commentators stated, in effect, that virtually every federal, state and municipal fire code requires the use of wired glass, and that $\frac{1}{4}$ inch wired glass is the only material currently manufactured that meets the requirements of such fire codes. The commentators stated that such glass cannot now meet the requirements of the standard.

The commentators indicated that the hazards of injury by being struck by a door while it is being opened, or of death, personal injury, and more extensive property damage by handicapping fire fighting, outweigh the types of injury to which the standard is addressed. Presumably they believe that if wired glass for fire doors must comply with the standard, vision panels in fire doors would disappear, resulting in decreased safety to occupants and firefighters during a fire and increased door accidents during routine use of the building.

At the public hearing, a representative of the C-E Glass Co. advanced the proposal that should the Com-

mission continue to believe that wired glass should be included within the scope of the standard, then the industry should be permitted sufficient time to develop the necessary technology for the production of glazing materials for use in fire doors which will meet the requirements of a standard.

The Commission has investigated these comments. It recognizes that wired glass which is intended to retard the passage of fire is often used in high risk locations where there is genuine potential for serious injury from the hazards the standard is designed to prevent. The Commission believes that wired glass intended for use in doors and other assemblies which will both retard the passage of fire and meet this standard can be developed. However, the Commission does not have sufficient information to determine whether wired glass intended to retard the passage of fire and which would meet Category I impact test requirements (specified in § 1201.4(d)) is available at this time. Consequently, for the reasons advanced by the commentators, the Commission has decided for good cause and in the public interest and safety to defer for 2½ years from the effective date of the standard the effective date of the standard as to wired glass used in doors or other assemblies subject to this Part 1201 and used to retard the passage of fire, when such wired glass is required by federal, state, local or municipal fire ordinances. A deferred effective date of 2½ years from the overall effective date has been established in order to allow a period of time for the technological development of such materials, and additional time for fire codes to be amended in order that glazing materials meeting the requirements of both the fire codes for retarding the passage of fire and Category I of this standard might be readily manufactured and marketed. This deferred effective date is reflected in §§ 1201.1(c)(1) and 1201.7 of the final standard.

Furthermore, the Commission has made a revision in the standard which should further assist in meeting the requirements of both fire codes and the standard. In the proposed standard, § 1201.2(a)(3) and (4) established the dividing line between Category I and Category II doors, storm doors, and glazed panels at 6 square feet. Thus, depending on the size of the glazing material some products covered by this standard and required to retard the passage of fire would have been required to use glazing material meeting Category I requirements, whereas others would have been required to use glazing material meeting the more stringent Category II impact requirements (see § 1201.4(d)(1)). For reasons which are more fully discussed in section III(B) of this preamble, the dividing line between Category I and Category II doors, storm doors and glazed panels has been revised from 6 to 9 square feet. As a result of this [1431] change, fire doors, as defined by the National Fire Protection Association standard for fire doors and windows (NFPA 80-1975), would fall within Category I requirements which are less stringent than Category II requirements. The Commission believes that these changes continue to provide protection to the public because there is little, if any, likelihood for full body impact with glazing material in doors and other assemblies intended to retard the passage of fire, which is the hazard the impact levels of Category II are intended to address.

4. *Louvers of jalousie doors.* The Exterior Home Products Manufacturers Association, Karey Products Corporation, and The Perfect-Seal and Louvre-Seal Corporations have requested an exemption from the standard for the louvers of jalousie doors.

The operating louvers or vents in a jalousie door are generally made of annealed glass. Each louver is one of a series of overlapping pieces of glazing material de-

signed to admit ventilation and light but exclude rain. The louvers have rounded edges which when opened point outward toward anyone approaching the door. When closed, the louvers overlap one another. The louvers are operated by a crank and gear mechanism located on one side of the door, and proper closing of one louver against the other to ensure a weather tight seal is dependent upon the louvers being rigid and perfectly flat.

Annealed glass appears to be uniquely suited for use in the louvers of jalousie doors. There is some question whether tempered glass can be used in louvers due to the possibility that such glass may warp when employed in sizes used in louvers. The use of laminated glass, whose edges allegedly cannot be polished, could result in sharp and potentially hazardous edges. The use of laminated glass may also meet with a good deal of consumer resistance because the exposed interlayer might be thought by many to be esthetically unsightly. It is also probable that organic-coated glass would be unsuited to this form of usage because the adhesive bond would be exposed to the weather creating the possibility of delamination. The practicability of mandating the use of plastics is undermined by the fact that plastics tend to lose visual clarity over a period of time through clouding or scratching. Some plastics also appear to be too flexible for louver use.

The Commission estimates from its surveillance information that 226 injuries associated with jalousie glass doors were treated in all hospital emergency rooms during 1975. There have been three in-depth investigations involving this product. Two of the injuries resulted from contact with the rough edge of the louver, while the third injury involved a person who punched the glass in anger and broke it.

Further, the Exterior Home Products Manufacturers Association has estimated that to require jalousie doors

to meet the requirements of the standard would increase the cost of the product by 25 percent to 30 percent, a figure which the Commission believes is reasonably accurate based upon its own economic analysis. In view of this information, the Commission has determined to exempt the louvers of jalousie doors from the requirements of the standard. Accordingly, § 1201.1(c)(2) of the standard reflects this exemption. In addition, the Commission has added a definition of jalousie door at § 1201.2(a)(12).

5. *Exemptions for glazing materials in small openings.* a. PPG Industries has requested an exemption from the standard for glazing materials used in openings in doors through which a 3-inch diameter sphere is unable to pass. PPG contends that a piece of glazing material this narrow could not possibly fail the impact test requirements of the standard (see § 1201.4(e)(1)(i)).

The Commission agrees in principle that there are certain size openings in doors in which glazing materials are unlikely to present the hazards identified because it is unlikely that any part of a consumer's body is likely to impact such a small opening or, if it does, is unlikely to pass into such an opening. Therefore, the Commission has determined to permit the exemption as requested. Accordingly, § 1201(c)(3) of the standard has been added to reflect this exemption.

b. Exterior Home Products Manufacturers Association requested an exemption for vertical lites or strips which are 6 inches or less in width and are used as decorative strips in high fashion jalousie doors.

The Commission believes that openings in doors through which a 3 inch diameter sphere can pass present the injury potential which the standard has been designed to reduce or eliminate. Accordingly, this specific

request for exemption is denied. However, as previously indicated, the Commission has granted exemptions for louvers in jalousie doors and for any openings in a door through which a 3 inch diameter sphere cannot pass.

6. *Commercial refrigerated cabinet doors.* Comments by Anthony's Manufacturing Company, Inc. recommend that the proposed standard include within the scope of its coverage glass doors of commercial refrigerated cabinets, typically used by consumers in food stores.

The definition of glazed panel contained in § 1201.2(a)(10)(iii) of the standard, if read literally, could be interpreted to include these products when the doors are open. However, it was not the intent of the Commission to include such products within the scope of the standard. Therefore with that fact in mind and since the Commission is unaware of any injury information as to these products, the Commission has determined to exempt commercial refrigerated cabinet glass doors from the scope of the standard at this time. Accordingly, § 1201.1(c)(6) reflects this exemption.

7. *Garage doors.* One commentator, Phenix Manufacturing Company, requested a clarification of § 1201.2(a)(7), which defines doors, as to whether glazing materials used in garage doors designed for vehicular passage are included in the scope of the standard.

The Commission intends that § 1201.2(a)(7) apply only to doors designed for human passage and therefore does not apply to garage doors designed for vehicular passage. However, glazing materials in doors of garages which are designed solely for human passage are included in the scope of Part 1201, since such doors are associated with the same types of injury as other doors designed for human passage. The Commission believes these explanations are clear in this standard and therefore has not changed the text as requested.

8. *Specialty products.* a. PPG Industries commented that certain specialty products, such as bullet resistant glazing, would be covered by the standard, but are consistently overdesigned when compared with the impact test criteria. For example, bullet resistant glazing is presumably so thick that it will consistently pass the impact test criteria.

PPG recommended that § 1201.4(a) (3) be amended to exempt these products from certain tests if it can be demonstrated that the product is overdesigned for the characteristic in question.

As stated earlier in the preamble, any obligation of a manufacturer to test glazing materials subject to the standard is created by provisions of section 14 of the Consumer Product Safety Act and any regulations thereunder prescribing a reasonable testing program which the Commission may issue. The Commission has stated its intention to begin a separate rulemaking proceeding to issue regulations governing reasonable testing programs for architectural glazing materials subject to the standard. Provisions to exempt materials from some or all of the requirements for testing, or to limit the amount of testing, will be addressed in a regulation governing testing programs when it is published for public comment.

b. A representative of The Association of Motion Picture and Television Producers, Inc. asked whether an exemption is being made for break-away glass in the making of motion pictures where such glass is needed in connection with the filming of motion picture stories.

Such glazing materials do not appear to be produced or distributed for sale to or for use or enjoyment of consumers, but are used only by employees of motion picture producers. Therefore, such products do not appear to be consumer products and would not be covered by the standard.

9. *Curved glazed panels of revolving doors.* One commentator, the Crane Fulview Glass Door Company, inquired whether the Commission intended to include within the scope of the standard the curved sidelights (glazed panels)—see § 1201.2(a) (10)) of revolving doors.

The Commission does not have any injury information associated with the curved sidelights of revolving doors. It also recognizes that there is less likely to be a potential for injury from these items than with other sidelights by virtue of the design of revolving door assemblies.

The Commission also has conflicting information as to whether the use of laminated and tempered glazing are technologically feasible in the curved sidelights of revolving doors. Available information indicates that the use of thick annealed glass would be costly and that the use of plastic glazing may present scratching and clouding problems. Finally, the specific test procedure set out in § 1201.4 would have to be adapted before it could be used with these curved glazing materials.

In view of the foregoing, the Commission is exempting curved sidelights of revolving doors from coverage of the standard. This exemption is set out in § 1201.1(c) (5). If the Commission obtains information indicating that an unreasonable risk of injury exists with respect to these curved sidelights, the Commission will consider amending the standard by repealing the exemption and, if necessary, revising the test procedure to accommodate such materials.

10. *Leaded glass.* Visador, a manufacturer of decorative leaded glass, requested a limited exception under suggested conditions for this product. Doorlite Producers Association requested a complete exemption for this product.

Leaded glass is a composite glazing panel composed of relatively small pieces of glass, the individual pieces being supported by lead or zinc bars. When used, it is used primarily as glazing material in doors and glazed panels of residential dwellings. Leaded glass is a specialized, rather expensive product used for its esthetic qualities. As a result, it is used infrequently. Because of the infrequent use of the product in locations addressed by the standard, it is difficult to assess the degree of the risk of injury associated with this product.

Visador has suggested that leaded glass be excluded from the scope of the standard when the individual panels are no greater than thirty square inches, and the total leaded glass area is no greater than 6 square feet. The 6 square feet limit was requested, in part, to be consistent with the Commission's dividing line between Category I and Category II doors and glazed panels included in the proposed standard (see proposed § 1201.2 (a) (3) and (4)).

The Commission recognizes that inclusion of leaded glass within the scope of the standard would result in a reduction in its esthetic qualities, and loss of consumer utility. The Commission is also aware that leaded glass is a specialty product and represents an extremely small part of the total market for glazing materials.

Therefore, the Commission has determined to exclude leaded glass from the requirements of the standard when no individual panel of glass is greater than thirty square inches. The Commission has also concluded that no restriction is necessary for the total leaded glass area. Accordingly, § 1201.1(c) (4) has been added to reflect this exemption.

11. *Glazing materials in boats.* An interested individual recommended that glazing materials used in boats should be required to comply with the standard.

Section 3(a)(1)(G) of the CPSA (15 U.S.C. 2052 (a)(1)(G)) excludes from the CPSC's jurisdiction boats which could be subject to safety regulation under the Federal Boat Safety Act. Since glazing materials on boats could be subject to such regulation, the Commission has no authority to require that glazing material used in boats comply with the Commission's standard.

12. *Residential greenhouses and storm windows.* The Plastic Safety Glazing Committee and Rohm and Haas Company requested that residential greenhouses and removable storm windows be included within the scope of the standard.

To the extent that doors of greenhouses and glazed panels fall within the definition of doors and glazed panels in § 1201.2(a)(7) and (10), they would be subject to the standard. The requirements of the standard would not apply, per se, to other portions of greenhouses. This principle would apply to all greenhouses used by consumers.

Removable storm windows are considered by the Commission to be windows. Windows in general are not included within the scope of the standard for reasons detailed in the preamble to the proposed standard (41 FR 6178, February 11, 1976).

13. *Glazing materials in mobile homes and motor homes.* a. The Skyline Corporation and the Flat Glass Marketers Association submitted a recommendation that the standard should expressly exclude glazing materials used in mobile homes.

The Commission has concurrent jurisdiction with the Department of Housing and Urban Development (HUD) over consumer products used in or around mobile homes as that term is defined in the Mobile Home Construction and Safety Standards Act (Mobile Home Act). Pursuant to that act, HUD has issued construction and

safety standards for mobile homes which, in part, include requirements for the use of safety glazing materials in windows and sliding glass doors, unbacked mirrored wardrobe doors, shower and bathtub enclosures and surrounds to a height of 6 feet above the bathroom floor level, storm doors or combination doors, and in panels located within 12 inches on either side of exit or entrance doors (24 CFR 200.114, 40 FR 50757). In order to avoid a conflict between HUD's standards and the Commission's standards, the Commission has, as a matter of policy, determined not to apply this standard to architectural glazing material used in the architectural products identified in § 1201.1(a) of the standard when the products are used in mobile homes. Section 1201.1(b) of the standard has been changed, accordingly.

b. PPG Industries commented that the definition of mobile home appears to include motor homes and that such vehicles should be under the jurisdiction of the National Highway Traffic Safety Administration and not the Commission.

Section 3(a)(1)(C) of the Consumer Product Safety Act (15 U.S.C. 2052(a)(1)(C)) excludes from the Commission's jurisdiction motor vehicles and motor vehicle equipment as defined by the National Traffic and Motor Vehicle Safety Act. To the extent that glazing materials used in motor homes would be motor vehicle equipment, they would not be included within the scope of the Commission's standard. No additional amendment to the standard is necessary to indicate this lack of authority.

14. *Laminated glass.* Representatives of manufacturers of laminated glass have objected to provisions of the standard which they believe adversely affect them. The Glass Tempering Association and the Ford Motor Company have suggested that there are no recorded instances from injury from the use of laminated glass,

and that more severe test procedures than those recommended by CSGC are not warranted. Ford, Buchmin Industries, Globe Amerada Glass Company, Libby-Owens Ford Company, and the Glass Laminators Committee have claimed that laminated glass should not be subject to the 400 foot pound impact test level set out in § 1201.4(d)(1). All have claimed that there would be a serious economic effect, primarily on competition between laminated glass and its competitors, by mandating the standard as proposed, and that this effect is unwarranted in view of the safety record of laminated glass.

Three remedies have been suggested by these commentators. These are: (1) A return to the test procedure recommended by CSGC which provides for incremental levels of impact and usually has the effect of subjecting laminated glass to no more than 150 foot pounds of kinetic energy, (2) testing laminated glass at one level intermediate between 150 foot pounds and 400 foot pounds rather than at 400 foot pounds, or (3) modifying the definitions of Category I and Category II (§ 1201.2(a)(3) and (4)) so that the dividing line for glazing materials used in doors, storm doors, and glazed panels is 18 square feet rather than 6 square feet.

The Commission acknowledges that laminated glass is safer than annealed glass. However, for the reasons discussed in section III(C)(1)(a) of this preamble, the Commission believes that 400 foot pounds is a foreseeable kinetic energy of human impact for glazing material, including laminated glass, where there is a possibility of full body impact. Failure of products used in such locations to withstand impacts or break acceptably at 400 foot pounds could result in those injuries which the standard is designed to reduce or eliminate. A possible explanation for the lack of injury data associated with laminated glass is that laminated glass has not been used to the same extent as annealed glass so that exposure to injury from laminated glass is less.

The Commission's economic analysis indicates that the competitive impact of the proposed changes would not severely weaken the position of laminated glass in the market place. (See Economic Considerations, Part III(D) of this preamble). This analysis indicates that there will be a price increase which will be borne by consumers but that the increase will be minor. Despite the increase, the Commission continues to believe that glazing materials should withstand impacts or break acceptably at levels of kinetic energy which are foreseeable in the event of human impact.

The Commission does not agree with the suggestion that the demarcation for glazing materials in Category I and Category II doors, storm doors, and glazed panels be changed from 6 square feet to 18 square feet. This change would have the effect of putting most, if not all, doors and glazed panels for residential uses in Category I and would fail to subject some sizes of glazing materials that are large enough for full body impacts to kinetic energy levels which are foreseeable. However, for reasons discussed in section III(B), "Distinction Between Category I and Category II," of this preamble, the dividing line will now be set at 9 square feet. (See § 1201.2(a)(3) and (4)).

15. *Organic-coated glass.* a. One manufacturer of organic-coated glass, Break-Safe Glass, and one manufacturer of the film used to make organic-coated glass, the 3M Company, have objected to provisions of the proposed standard which they believe adversely affect them. They have stated that there are no injuries from the use of organic-coated glass; that the product has more utility than its principal competitor (plastics) because of the scratch resistance provided by organic coated glass on one side; and that, a dividing line for glazing materials in Category I and Category II doors, storm doors, and glazed panels at six square feet so restricts their

potential market that they could not continue to sell the product because it could not meet the test criteria for impact of Category II products (see § 1201.4(d)(1)). They recommended that the dividing line between Category I and II (§ 1201.2(a)(3) and (4)) be set at 18 square feet to allow most products to use glazing materials tested at 150 foot pounds.

The Commission acknowledges that organic-coated glass is safer than annealed glass. However, for the reasons discussed in section III(C)(1)(a) of the preamble, the Commission believes that 400 foot pounds is a foreseeable kinetic energy of human impact for glazing materials where there is a possibility of full body impact. Failure of products used in such locations to withstand impacts of or break acceptably at 400 foot pounds could result in those injuries which the standard is designed to reduce or eliminate.

A possible explanation for the lack of injury data associated with organic-coated glass is that organic-coated glass is a new product with relatively few sales. Thus, there has not been significant use information to evaluate the risk of injury based on injury statistics alone. However, for the reasons set forth in the preamble discussion on laminated glass in section III(A)(14) and in section III(B) below, entitled "Distinction Between Category I and Category II", the Commission declines to set the dividing line between Category I and Category II at 18 square feet but has instead set it at 9 square feet.

The Commission's economic analysis of the standard's effect upon organic-coated glass is discussed in section D of the preamble, entitled "Economic Considerations."

b. PPG Industries commented that the definition of organic-coated glass, proposed at § 1201.2(a)(18), permits organic-coated glass to have a polymeric coating

on both sides of the glass but that the accelerated environmental durability tests, proposed at § 1201.4(d) (2) (ii), and the labeling provision which directs the orientation of the material on the product, proposed at § 1201.5(c), only permit use of glazing materials that have the coating on one side. It suggests that the Commission resolve this ambiguity.

The intent of the definition for organic-coated glass, now set out at § 1201.2(a) (20), is to include within its scope glass that has a polymeric coating on one or both sides. The intent of proposed § 1201.4(d) (2) (ii) and proposed § 1201.5(c) is to ensure that glass which has a polymeric coating on one side only, with an adhesive-coating system intended to be oriented to the inside of a building, is tested with that surface away from the radiant source of energy and labeled accordingly.

However, it was not intended that glass having a polymeric coating on both sides, or glass having an organic coating on one side and that is resistant on that side to outdoor weathering, be restricted to inside orientation. Accordingly, § 1201.4(c) (3) (ii) on test specimens, § 1201.4(d) (2) (ii) on test procedures, and § 1201.4(c) (2) (ii) have been revised to allow for testing under either condition. Section 1201.5(c) continues to prescribe labeling requirements for organic-coated glass that has been tested for environmental exposure from one side only.

16. *Windblown missiles and wind induced blowouts.* A professor at Villanova University commented that the standard should include requirements for hazards associated with the impact of windblown missiles and with wind induced blowouts of wall panels.

Such hazards are not included in the risks of injury cited in the notice of proceeding or in the proposed standard. The Commission also has no injury information

associated with these hazards. Accordingly, the request is denied.

B. *Distinction between Category I and Category II.* Several comments were made recommending an upward revision of the 6 square foot division point for glazing materials in Category I and Category II doors, storm doors and glazed panels (§ 1201.2(a) (3) and (4)). Representatives of manufacturers of laminated glass and organic-coated glass suggested a division point of 18 square feet.

The proposed standard divided products containing architectural glazing materials into two categories for impact test purposes depending in part upon the area of the individual pieces of glazing used. The division point was established at 6 square feet. Section 1201.2 (a) (3) of the proposal defines Category I doors, storm doors, and glazed panels as those in which no piece of glazing material is greater than 6 square feet in surface area, and § 1201.2(a) (4) defines Category II doors, storm doors, and glazed panels as those in which any piece of glazing material is greater than 6 square feet in surface area. Section 1201.4(d) (1) requires that glazing materials used in Category I products meet the criteria of the standard when tested at 150 foot pounds, while glazing materials used in Category II products must meet the criteria when tested at 400 foot pounds. These impact requirements are designed to ensure that glazing materials for each of the two categories will not break or will break with characteristics less likely than other glazing materials to cause an unreasonable risk of injury.

After careful consideration of the comments received in the public record, engineering and medical sources, and information provided by its staff, the Commission has determined that the proposed division point of 6 square feet is unnecessarily restrictive. Consequently, the definitions of Category I and Category II doors, storm

doors, and glazed panels have been revised. The two categories of products are intended to differentiate products where there is a potential for full body impact from those products where there is not such a potential. In order to have full body impact, an individual must be able to fit through an opening without contacting any portion of the supporting frame or the frame will absorb an unknown amount of the total energy. The age group most frequently injured in accidents associated with architectural glazing materials is children under the age of 15. In the judgment of the Commission, children aged 11 years and older appear to be able to generate 400 foot pounds of kinetic energy and could deliver a full body impact to glazed panels of 9 square feet or greater. Therefore, it is estimated that in an accident situation such children could impact a panel larger than 9 square feet with a kinetic energy greater than 150 foot pounds.

Moreover, many products containing glazing materials in pieces which are 9 square feet or less usually have the glazing material located so that full body impact is not likely to occur. For instance, in storm doors incorporating one large panel of glazing material over most of the area of the door, and in which full body impact is probable, the glazing material is in excess of 9 square feet. In storm doors containing one smaller panel of glazing material, that glazing material is generally located in the upper half of the door. Where 2 or more small panels are used, the area of each piece is less than 9 square feet and each piece is utilized in such a manner so as to make full body impact with either piece unlikely. [1434] Therefore, the Commission believes that a 9 square foot division point between Category I and Category II doors, storm doors, and glazed panels is reasonable. Section 1201.2(a)(3) now defines Category I doors, storm doors, and glazed panels as those in which no single piece of glazing material is greater than 9 square feet

in surface area, and § 1201.2(a)(4) now defines Category II doors, storm doors, and glazed panels as those in which any piece of glazing material is greater than 9 square feet in surface area.

C. *Test procedures.* Many of the written comments and a good deal of the oral testimony dealt with the test procedures contained in § 1201.4 of the proposed standard.

1. *Impact test procedures.* Eleven substantive written comments relate to the impact testing procedures of § 1201.4(d)(1) of the proposed rule. The transcript of the oral testimony also contains significant testimony on this matter. The commentators were Associated Laboratories, Inc.; CSGC; Associated Certification, Inc.; Glass Tempering Association; Flat Glass Marketing Association; PPG Industries; Fourco Glass Company; Libby-Owens-Ford Company; International Conference of Building Officials; Glass Laminators Committee; C. E. Glass Company; 3M Company; and the Globe Glass and Trim Company.

a. *Impact kinetic energies.* 1. A number of commentators requested the use of the incremental impact test procedure of the offeror's recommended standard, which provides for a test specimen of glazing material to be impacted at increasingly higher kinetic energies until breakage occurs or the specimen fails to break from a 48 inch drop height (400 foot pounds of kinetic energy). This incremental loading procedure does not check break patterns above the lowest drop height from which breakage occurs, and therefore the Commission believes it to be deficient.

The Commission is of the opinion that the incremental loading procedure also has the anomalous effect of passing materials which break acceptably at a lower energy yet failing others which do not even break at that lower

energy but break unacceptably at a higher energy level. Accordingly, the Commission still approves of the procedure of the proposed standard, which abandons the incremental loading procedure, and instead provides a more performance oriented impact procedure which divides products into two categories according to the expectation of high energy or low energy impacts. In view of the foregoing, an impact test procedure based on two categories has been retained in the final standard at § 1201.4 (d) (1).

2. One commentator argued that materials that pass the impact test level for Category II should not also be required to be tested at the impact test level for Category I in order to be used in Category I products. Others stated that impact testing should be required at both levels if the glazing material is to be certified at both levels.

The Commission is unaware of any instance in which glazing materials that pass the Category II requirements would not also be adequate for Category I requirements. Therefore, it has concluded that materials that pass the impact test requirements for Category II may be used in either Category I or Category II applications. Glazing materials intended solely for use in Category I applications must continue to be tested in accordance with the impact test procedure for Category I. Accordingly, § 1201.4(e) (1) has been revised to reflect this alteration in the test procedure.

3. Several commentators stated that it is unnecessarily restrictive and unjustifiable to require glazing materials used in Category I and Category II products to meet the impact test drop heights in the proposed standard of 18 inches (150 foot pounds kinetic energy) and 48 inches, (400 foot pounds kinetic energy) respectively. Although these two drop heights were used in the impact test pro-

cedure recommended to the Commission by the offeror, they were used only if a material failed to break at a lower drop height of 12 inches. In the proposed standard, the 18 inch drop height is mandated for Category I products, resulting in a kinetic energy of 150 foot pounds at impact. The 48 inch drop height is mandated for Category II products, resulting in a kinetic energy at impact of 400 foot pounds.

When the Commission evaluated the recommended standard submitted to it by the offeror, it recognized that materials should not be accepted by tests based on unrepresentative energy levels. It further recognized that glazing materials used in products in such a manner that full body impacts are reasonably foreseeable should be tested at higher energy levels than glazing materials used in products where reasonably foreseeable impacts would tend to be at lower energy levels and generally confined to less than full body impacts.

Because the Commission had not conducted experiments of its own to determine appropriate levels of test impact energy, the Commission used data from the offeror, the National Center for Health Statistics, and from CPSC studies of football players to calculate probable ranges of expected energy levels for full body and less than full body impacts. The results of these calculations were then compared to the three energy levels of 100, 150 and 400 foot pounds found in the standard recommended by the CSGC to determine if any or all of them were appropriate. (Engineering Report, Bureau of Engineering Sciences, August 20, 1975). The Commission also reviewed information contained in the voluntary standard ANSI Z97.1-1975, "Performance Specifications and Methods of Tests for Safety Glazing Material Used in Buildings," September 26, 1975; information contained in the Testing and Standards Subcommittee Report submitted by CSGC; and calculations submitted by CSGC regarding

energy levels of the impact test and energy levels involved in accidental human contact with glazing. (ANSI standards are approved and published by the American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018.)

Expected maximum velocity and mean weight, broken down by age group, were determined from the information supplied by the aforementioned sources. From this procedure, it was estimated that kinetic energies that could be generated ranged from 59 foot pounds for children under five years old to 1503 foot pounds for a running male football player. These energy levels were then adjusted using factors suggested by CSGC to estimate the kinetic energies likely to be generated by various body parts in different impact situations.

The results of the estimates, which as indicated in the preamble to the proposal are available for review by the public, showed that the 400 foot pound energy level (corresponding to the 48 inch drop height) could offer protection to most adult males for lower extremity, torso and arm contact and thus those in other age groups as well. The Commission therefore considered a 400 foot pound test requirement to be in an appropriate range of values to protect consumers against injuries due to full body impact.

For smaller glazing applications, the estimates showed that the 100 foot pound energy level (corresponding to the 12 inch drop height) of the CSGC's recommended standard would protect only the age group below five years old. On the other hand, the 150 foot pound energy level (corresponding to the 18 inch drop height) appears to offer protection for hand and arm impacts to adults and protection to children below 10 years old for whole body impacts. Thus, a more appropriate level for Category I appears to be 150 foot pounds. For this reason, the Commission has chosen the 150 foot pound energy

level for Category I products instead of the 100 foot pound level. Section 1201.4(d)(1) of the standard has therefore not been changed in this regard.

4. 3M stated that the proposed test levels in § 1201.4(d)(1) appear to be inconsistent with CSGC test results. To determine if the proposed test levels are inconsistent with the CSGC test results, it is necessary to consider the test procedures used by CSGC. CSGC asked human volunteers to walk and run into panels which were instrumented to measure the energy absorbed by the panel when impacted by the subject. While this testing suggested the glazing materials when impacted absorbed energies lower than 400 foot pounds, the Commission believes that to ask volunteers to incur full body, full speed impacts, where the potential for harm appears so real, may result in test impacts of lower values than occur in actual accidental situations. Therefore, the Commission disagrees with the observation of 3M.

5. Several commentators objected to the concept in the proposed standard of two categories of products for which the glazing materials must meet different impact test levels. The Commission believes [1435] it is meaningful to provide different tests for products that will be foreseeably subject to full body impact and those subject to less than full body impact because:

- a. the prescribed test impacts are reasonably related to foreseeable human impacts, as discussed above, and;
- b. the alternatives to the use of such categories at this time would appear to be either a return to the deficient incremental loading concept recommended by CSGC (discussed above); or imposition of uniform test requirements which are unnecessarily strict and would eliminate some safety glazing materials; or evaluation of breakage at a series of energy levels, which would cause an undue test burden.

After due consideration, the Commission determined to retain in § 1201.2(a) (3) and (4) of the final standard two categories with different impact test requirements for each category (§ 1201.4(d) (1)), and a revised dividing line of 9 square feet.

b. *Impactor.* 1. Sears, Roebuck and Co. commented with regard to the impactor that glass will break at different kinetic energies depending upon the size and shape of the impactor, its velocity, and other characteristics of the impact. The Commission agrees with the comment. Glass breakage is typically a phenomenon which originates at the surface, and an impactor that is smaller or harder than the impactor prescribed in § 1201.4(b) (2) of the standard will be able to raise higher surface stresses at the same kinetic energy. Similarly, various parts of the body impart differing types of impacts to glazing material.

Both CSGC and the Commission were aware of problems of matching a single impactor to several different body parts that could impact glazing materials. This anomaly will arise with any impactor chosen, and the Commission has not seen any persuasive specific data indicating that §§ 1201.4(b) (2) or 1201.4(d) (1) should be revised.

2. Another commentator, PPG Industries, suggested that the 4 ounce (0.11 kilograms) weight tolerance for the 100 pound impactor contained in § 1201.4(b) (2) (i) be increased to one pound, because PPG contends it is difficult to construct an impactor with the weight tolerance specified in the proposal. However, because this impactor is tightly filled with lead shot, the possibility arises that a fairly small decrease in the amount of shot would work a significant change in the impact absorbing characteristics of the impactor, thereby adding another variable to the test method. The weight tolerance specified in § 1201.4(b) (2) (i) can be achieved by persons

testing under the standard and, in fact, has an established and recognized history. Therefore, the Commission has retained it in the standard.

3. The Glass Laminators Committee commented that secondary impacts caused by the punching bag impactor can occur. The Commission is of the opinion that secondary impacts can be controlled, for example, by means of a tie line in connection with a cam cleat or a jam cleat.

2. *Interpretation of impact test results—*a. *Three inch hole test.* 1. CSGC, PPG Industries, 3M Company, Libby-Owens-Ford Company, Glass Laminators Committee, and Globe Glass and Trim Company commented in regard to the provision in § 1201.4(e) (1) (i) (A) of the proposal (§ 1201.4(e) (1) (i) of the final standard), regarding one criterion for interpreting results of the impact tests. They stated that moving the broken glazing to a horizontal position in order to measure whether a 3 inch sphere will pass through might induce additional breakage not related to the punching bag impact or to impact conditions in real life, but related only to the weight of the glazing.

The Commission's intent in requiring the impacted glazing to be moved to a horizontal position is to deal with an inadequacy in CSGC's recommended test procedure for the 3 inch hole criterion which allowed specimens to pass if a shard of glazing material remains dangling in the opening. In such a case, the specimen would have passed because geometrically there is not a 3 inch hole, despite the fact that the specimen still presents an unacceptable hazard. The procedure in § 1201.4 (e) (i) requires turning the broken specimen horizontally so that such a shard will fall through, exposing the hole.

Another intent of the horizontal measurement is to address the situation where the material opens wide during impact (thus presenting the hazard of exposing limbs to entrapment) but closes to a smaller size before meas-

urement. Furthermore, in an accident situation the victim could foreseeably create a larger opening by secondary contacts with the glazing material, or by momentum from the initial impact. Therefore, some additional breakage is foreseeable, and a procedure which may produce some additional breakage is not unreasonable. To address these two hazards, the Commission believes that the test procedure which causes additional stress on the opening by the force created by the weight of the glazing material in a horizontal position and by placing of a 4 pound ball on the opening is reasonable. Therefore, the Commission has retained the provisions of § 1201.4(e) (1) (i).

2. Several commentators stated that in the interpretation of results of the impact test (§ 1201.4(e) (1) (i) the standard as worded does not cover the instance in which the edge of organic-coated glass pulls from the frame yet the broken specimen remains completely intact. Tests conducted for the Commission demonstrated that such occurrences can and do happen during testing. If the organic coating and adhesive are so strong that they hold the specimen intact even though it pulls out of the test frame, it is foreseeable that the same would happen even more frequently in architectural uses, where the glazing is less firmly gripped by the framing. In such a case, a person impacting the glazing would not be pierced or lacerated by holes opening in the specimen, which remains intact. In such a situation, the specimen would be acceptable under § 1201.4(e) (1) (i) since this section states: " * * * no opening shall develop in the test sample through which (the three-inch diameter sphere may pass)" [Emphasis added]. Therefore, § 1201.4(e) (1) (i) has not been revised in this regard.

Because the broken specimen may hang limply out of the frame as in the above case, commentators have questioned how the 3 inch diameter sphere criterion of § 1201.4(e) (1) (i) may be applied with the specimen in

a horizontal position. Although it is not desirable to handle broken glass, it should be possible to support the edges of the broken specimen in a horizontal position and then set the test sphere on this supported specimen. The Commission would permit this procedure only if the edge of the specimen had actually pulled out of the subframe, because it is only in that case where the edge of the original specimen needs to be supported.

3. A commentator implies that the 3 inch diameter sphere will pass through openings in different materials in different periods of time, and he asks how long the sphere should be left in the opening. The intent of using the sphere is to make a geometric test as is done in the offeror's recommended standard, to push aside any dangling shards, and to address the situation where the glazing material has closed after impact. The sphere may be removed quickly and still satisfy these intents. For the sake of uniformity, the Commission has determined that a time of one second would be technically appropriate. Section 1201.4(e) (1) (i) has been revised accordingly.

b. *Modulus of elasticity and hardness.* 1. Comments on § 1201.4(e) (1) (i) (C) of the proposal (§ 1201.4(e) (1) (iii) of the final standard), relative to the hardness and modulus of elasticity of plastic glazing materials, were received from the Plastic Safety Glazing Committee, representing the domestic plastic industry; Rohm and Haas Company and Dow Chemical Co., manufacturers of plastic glazing materials; and Associated Laboratories, Inc. Two of these organizations also made oral presentations at the public hearing. Several of these comments requested different tests for modulus of elasticity (stiffness) and hardness from those specified in the proposed standard.

For the purposes of determining whether plastic glazing materials meet necessary stiffness and hardness val-

ues, the Commission has determined that the proposed tests shall be included in the final standard, rather than the other tests which the comments recommended. The tests which were proposed have an established and recognized history and the public record contains no arguments persuasive to the Commission as to why they should be revised or eliminated.

Section 14 of the CPSA regarding certification, rather than the standard, imposes obligations on manufacturers to test products subject to the standard. The Commission plans to issue regula- [1436] tions under section 14 governing reasonable testing programs for certification of compliance with the standard. The Commission will in that proceeding consider the possibility of permitting stiffness and hardness tests for purposes of certification other than those currently set forth in § 1201.4(e) (1) (iii) of the final rule. Nevertheless, the Commission will employ the stiffness and hardness tests specified in the standard in its compliance program.

2. Rohm and Haas Company recommended that the first line of proposed § 1201.4(e) (1) (i) (C) be revised to specify that plastic glazing materials must actually be impacted.

In view of the fact that the proposed criteria for plastic glazing materials do not contain performance specifications, the Commission is of the opinion that there is no technical reason to require that plastics actually be impacted since the proposed criteria are measurements of stiffness and hardness, which can be measured independently of an impact test and would not be altered by an impact test. The Commission therefore has determined that the criteria in the final standard, now set out as § 1201.4(e) (1) (iii), should not be changed. For clarity, the Commission has indicated at § 1201.4(d) (1) that such specimens need not be impacted.

3. Associated Laboratories suggested that the allowable modulus of elasticity and hardness readings be raised by 33 percent. The comment states that this change would include all known plastics. (The proposed levels, so far as is known to the Commission, allow all presently used glazing plastics to pass the impact test. The suggested change would allow all plastics to pass the test.)

In the absence of empirical or experimental correlations between the two suggested measurements and safety, the Commission believes that the suggested revision should not be made. For a given thickness of material, such a revision would result in passing plastics of lesser impact resistance than would pass under the standard as proposed. If such plastics were marketed and used as glazing materials in the products covered by the standard, they could be involved in a statistically higher number of breakages, which marginally would increase the risks associated with these products. Moreover, no manufacturer of plastics has furnished information to the Commission indicating that a product will be adversely affected by the modulus of elasticity and hardness criteria as proposed and now included in the final standard at § 1201.4(e) (1) (iii).

c. *Criterion for 10 largest pieces.* The criterion contained in proposed § 1201.4(e) (1) (i) (B) was the subject of comments by Associated Laboratories, Inc. and Associated Certification, Inc. That section provides that specimens pass the impact test when the 10 largest crack-free particles selected within five minutes after the test weigh no more than a certain amount.

1. Associated Laboratories suggested substituting a shape factor for the proposed criterion. Associated Certification suggested shortening the time allowed to search for and weigh the 10 largest pieces and cushioning hard

surfaces behind and below the test frame upon which the broken pieces impact.

After careful consideration, the Commission determined not to make these recommended revisions. The test as proposed has an established and recognized history as part of the voluntary standards and appears to have served well over the years. The Commission considers the test procedure included in the final standard at § 1201.4(e) (1) (ii) satisfactory to eliminate or reduce the risks of injury associated with glazing materials. The recommended revisions would make the test more stringent than the proposal, a development for which the Commission sees no compellingly persuasive reason.

2. Associated Certification, Inc. reported having seen a large number of poorly tempered specimens break into large pieces having cracks which terminate within the shard. Such cracks have prevented the particle from being a "crack free particle" within the meaning of the proposed criterion, as a result of which the particle is not used for determining whether the specimen passes or fails the test.

Results of tests conducted by the Commission corroborate the commentor's statements, and the Commission has concluded that use of the term "crack free" in the proposed test may actually favor poorly tempered glass over well-tempered glass. Consequently, the term "crack free" has been excised from the final standard and an additional sentence containing a definition of "particle" has been added to § 1201.4(e) (1) (ii) to clarify that a poorly tempered piece of glass which has a crack terminating within the shard is to be considered for inclusion as one of the 10 largest pieces, and to indicate that a network of granules is not considered a "particle" but is instead a grouping of many particles.

d. *Included angle criterion.* In the preamble to the proposed standard, the Commission solicited comment on a staff developed provision that plastics be impacted and pieces no longer than 2 inches remaining in the frame after the impact test be no sharper than 60 degrees (an included angle requirement). The Commission received a number of comments on this subject.

After consideration of the comments received relative to the issue of an included angle criterion, the Commission has determined that most of the issues raised on the proposal concerning this matter are still unresolved. Therefore, the final standard issued below contains no included angle criterion for determining whether a specimen passes the impact test. The Commission is commencing technical studies looking toward the resolution of this matter. If this additional effort leads to development of a criterion which is considered by the Commission to be acceptable either for plastics or for other glazing materials, the Commission may consider amending this standard in accord with the provisions of section 9(e), CPSA, 15 U.S.C. 2058(e).

3. *Environmental durability tests—*a. *Equipment.* PPG Industries, Atlas Electric Devices Company, and Rohm & Haas Company submitted comments addressed to the environmental durability test equipment specified in § 1201.4(b) (3) (i) and (ii) of the proposed standard.

1. PPG commented upon the equipment for conducting the boil test for laminated glass as specified in § 1201.4 (d) (2) (i) of the proposed standard. PPG requested that the first soak required in the boil test be made optional. The request if granted, would allow the test equipment to be composed of one tank of water instead of two. Under the proposed standard, this equipment consists in part of two tanks of water, one maintained at $150^{\circ} \pm 5^{\circ}$ F ($66^{\circ} \pm 2^{\circ}$ C) and the second at a slow boil at atmos-

pheric pressure. (See § 1201.4(b)(3)(i)). The test procedure of the proposed standard specified that the specimens shall first be placed for three minutes in the tank containing the water at 150° F. This is called the first soak. The specimens are then quickly removed and put in the tank containing the boiling water where they experience the second soak for two hours.

The actual test is the second soak. The purpose of the first soak is to provide a transition phase for the test specimens, in the form of an intermediate temperature, so that they are not exposed to severe thermal shock upon being thrust into boiling water directly from room temperatures. By protecting the test specimens from such thermal shock, the test procedure minimizes the likelihood of the glass cracking, which could invalidate that trial and require that the test be repeated.

The purpose of the test procedures in the standard is to specify how the Commission will conduct compliance testing. Omission of the first soak of the boil test would only affect the efficient conduct of such testing due to the increased likelihood of a test specimen's cracking from thermal shock, which in turn would lead to an increase in the number of specimens that must be discarded before an uncracked specimen can be evaluated. Accordingly, the Commission has not modified §§ 1201.4(d)(2)(i) and 1201.4(b)(3)(i) of the standard.

However in the certification regulation to be issued subsequently, the Commission will consider providing that a boil test, which omits the first soak (150° F) specified in the procedure, is the technical equivalent of a boil test when conducted exactly as specified in the standard. This change, if permitted, would allow manufacturers of laminated glass to conduct a reasonable testing program in accord with Section 14 of the CPSA, in

which the first soak of the boil test specified in § 1201.4(b)(3)(i) is omitted.

2. Atlas Electric Devices Company made many technical comments concerning the range of test equipment available for accelerated weathering and the proper use of such equipment. Five of these comments were technical state- [1437] ments making no requests or suggestions for change and, therefore, they are not discussed in this document.

Eight of Atlas' comments pertain to the various types and uses of test equipment required by § 1201.4(b)(3)(ii) of the proposed standard for simulated weathering tests. These points were technical in nature and pointed out ambiguities in the description of the test equipment. The Commission has determined that the standard should clearly specify the particular pieces of test equipment to be used by the Commission when it conducts compliance testing using the simulated weathering test or other accelerated weathering tests specified in the standard. The Commission has deleted from the final standard the following sections that appeared in the proposal: 1201.4(b)(3)(iii) (Outdoor weathering test equipment), 1201.4(b)(3)(iv) (Intensified weathering test), and 1201.4(d)(2)(iv) (Identification of plastic and adhesive specimens). In addition, the language of § 1201.4(b)(3)(ii) has been changed by deleting the requirement for use of the carbon arc Weather-Ometer and specifically defining the type of xenon arc Weather-Ometer equipment which the Commission intends to use for compliance purposes in simulated weathering tests. The Commission will expose samples in the xenon arc Weather-Ometer for 1200 hours. This exposure time has been estimated to represent the equivalent ultraviolet exposure of 2000 hours exposure in the carbon arc Weather-Ometer used by many testers and of 375,000 langleys of solar radiation (in the range of two to three years outdoor exposure in

Florida). There is underway an interlaboratory testing program sponsored by the American National Standards Institute which may determine and refine these equivalent exposures by measurement. When the study is completed, the Commission may consider amending the exposure requirements for the xenon arc Weather-Ometer. In such a situation, the amendment would be issued in accordance with section 9(e) of the CPA, 15 U.S.C. 2058 (e).

3. Rohm and Haas requested that the sentence "Recorders shall monitor the energy reaching the specimens" be deleted from proposed § 1201.4(b)(3)(ii) regarding simulated weathering test equipment. The company states that none of the test apparatus enumerated in that section has provisions for recording the energy reaching the specimens. The Commission believes that the use of the word "recorders" has caused a misunderstanding. The Commission intended to specify a device to either monitor or record the total amount of energy reaching the specimens. The Commission believes that the changes made in the final standard in § 1201.4(b)(3)(ii), based on the comments from Atlas Electric Devices Company, have also addressed the comment by Rohm & Haas. The new wording of this section specifies a piece of commercially available test equipment that has such a monitor.

b. *Test procedures and interpretations of results.* 1. Sears, Roebuck and Co. recommended reducing the strength of the glazing material prior to impact testing through abrasion and scratching. The standard is intended to reduce the unreasonable risks of injury associated with architectural glazing materials by assuring that the glazing materials used in certain architectural products either do not break when impacted with a certain energy, or break with characteristics that are less likely than other glazing materials to present an unreasonable risk of injury. The Commission has no information to indicate

that a decrease in the strength of the test specimen, which is brought about by abrasive conditioning of the specimen prior to the impact test, is likely to have an effect on the break pattern or likely to affect the result of the test. Therefore, the Commission declines to modify the standard as recommended.

2. 3M Company requested that the provisions of proposed § 1201.4(d)(2)(iv) regarding plastic specimens be extended to organic-coated glass. As proposed, this section permitted the use of infrared spectra for plastic specimens as a substitute for repeated accelerated environmental durability testing. The tester would attest that there had been no change in the formula of plastic safety glazing materials since material made to the same formula had first been subjected to environmental testing. 3M maintained that the weathering tests are long or expensive or both, and that the infrared spectrum can be used to show that the manufacturer is continuing to use the same plastic and adhesive.

For the reasons noted elsewhere in this preamble, § 1201.4(d)(2)(iv) of the proposal has been deleted from the final standard. However, as previously indicated, the Commission will issue regulations governing reasonable testing programs to support the certification required by section 14 of the CPSA by a separate rulemaking proceeding. Those regulations may allow the use of different test equipment or different test procedures as alternatives to the ones specified in the standard for particular materials under specified conditions.

(3) Associated Laboratories, Inc. and Eastman Chemical Products, Inc. commented in regard to the pass fail criterion set out in § 1201.4(e)(2)(ii)(A) for the accelerated weathering tests for plastics. They question whether permitting a 25 percent decrease in impact strength after weathering, as permitted by § 1201.4(e)

(2) (ii) (A) (2), has any effect upon the break characteristics of plastic glazing material or any correlation with safety.

The intent of the pass fail criterion for weathering was to prohibit any significant change in the impact strength of a plastic glazing material after weathering. The Commission believes any change in impact strength of a plastic glazing material after accelerated environmental exposure could indicate that there would be a significant change in mechanical characteristics of that glazing material due to weathering during use. Such long term changes could affect the long term break characteristics of the glazing material, and, therefore, its safety performance characteristics. The permitted decrease of 25 percent is believed to be the maximum decrease in the impact strength that can be permitted in this test without the expectation of a serious decrease in the actual long term impact strength.

4. Both Associated Laboratories and the National Highway Safety Research Center suggested that the Commission substitute the stiffness/hardness criteria of the impact strength test of the proposal (proposed § 1201.4 (e) (1) (i) (C), final § 1201.4 (e) (1) (iii)) in place of the Charpy type impact strength test used in the environmental durability procedure (§ 1201.4 (e) (2) (ii) (A)) both before and after environmental testing.

The Charpy type impact test has an established and recognized history as a standard engineering test method. The public record contains no arguments persuasive to the Commission that the Charpy type test is inappropriate for this standard. Furthermore, as indicated elsewhere in the preamble (Section III (C) (2) (d)), the Commission staff is currently studying alternative requirements to the stiffness/hardness tests as criteria to evaluate the breakage of plastics. Therefore, it appears

to be premature to investigate whether the stiffness/hardness criteria should be used elsewhere in the standard. Accordingly, § 1201.4 (e) (2) (ii) (A) is issued below without change.

D. *Labeling.* Proposed §§ 1201.5 (b) and (c) prescribed requirements for permanent labeling of certain types of plastic and organic-coated glazing to give information necessary for proper installation or use of those materials. Proposed § 1201.5 (d) prohibited the removal of any labeling required by proposed §§ 1201.5 (b) and (c) by anyone other than the ultimate consumer.

1. A comment from the Flat Glass Marketing Association states that there is no economic or empirical justification for prohibiting a fabricator or installer from destroying a permanent label when cutting a sheet of glazing material into smaller pieces, if the smaller pieces are then relabeled. (See proposed § 1201.5 (d)).

The purpose of proposed § 1201.5 (d) was to assure that all of the information which is required by the standard to appear on a permanent label will reach the ultimate consumer of the glazing material or product containing that material. The text of proposed § 1201.5 (d) did not take into consideration the possibility that some glazing materials may be cut to smaller sizes by fabricators and installers before they reach ultimate consumers. Accordingly, proposed § 1201.5 (d) has been deleted from the standard issued below. However, requirements for labels required to appear on glazing materials subject to the standard or on products incorporating those materials when those materials or products are [1438] sold to ultimate consumers may, under the authority of section 14 (c) of the CPSA, be issued in a separate rule-making proceeding.

2. The Plastic Safety Glazing Committee and Rohm & Haas Co. have recommended that the Commission elim-

inate the words " * * * and destructible polyester labels * * *" from the definition of permanent label set forth in § 1201.2(a)(20) as it is claimed that such labels cannot be permanent. The purpose of the permanent labels required in § 1201.5 is to ensure that a label cannot be transferred from the glazing material for which it is intended to some other glazing material. A destructible polyester label meets this intent. Therefore, the Commission has not changed the definition of permanent label now found at § 1201.2(a)(22) of the final standard.

E. Economic considerations. Numerous comments have been received relative to the economic implications of the proposed standard. The significant comments and the Commission's response thereto are set forth below.

1. *Laminated glass.* a. Buchmin Industries, Ford Motor Co., the Glass Tempering Association, Globe Amerada Glass Co., and the Glass Laminators Committee commented that currently manufactured laminated glass could not pass the 400 foot pound impact test level of § 1201.4(d)(1) of the proposed standard for Category II products. (See § 1201.2(a)(4)). Two of the commentators stated that this inability to pass the Category II impact levels would result in the elimination of the use of laminated glass in Category II products. Another commentator stated the plastic inner layer in laminated glass would have to be doubled in thickness to .030 inches in order to pass the impact test for Category II products. The commentators thus maintained that the standard would have an adverse economic effect on the laminated glass industry.

The Commission believes laminated glass currently used for Category I applications can meet the 150 foot pound impact test requirements found at § 1201.4(d)(1) of the proposal. However, not all laminated glass currently used for Category II applications can meet the Category II 400 foot pound impact test requirements. At

the time the proposed standard was published most of the laminated glass applications covered by the proposal required classification into Category II. The final standard has revised upward the division point between Category I and Category II from 6 square feet to 9 square feet (See § 1201.2(a)(3) and (4)). As a result, more applications for laminated glass covered by the standard will fall into Category I. However, many applications within the scope of the standard will still be covered by Category II requirements.

Manufacturers have indicated to the Commission that to pass the 400 foot pound test, the standard .015 inch plastic interlayer material now used in laminated glass would need to be doubled to .030 inch. (Official Transcript of Proceedings before the Consumer Product Safety Commission, page 33.) There is no technological impediment to meeting the standard, i.e., an additional .015 inch would not create a problem in fitting frames because current manufacturing tolerances on glazing and framing materials should accommodate this increase. However, manufacturers are concerned about the economic consequences of doubling the size of the interlayer material.

The Commission has obtained the following information on the possible economic consequences of this change. The incremental cost to the consumer for laminated glass with the thicker interlayer will vary because of the variance in mark ups, which depends primarily on the particular end use application and the distribution method. The incremental cost at retail is estimated to range from 55 cents to 65 cents per square foot for most applications. Because the standard should not affect the price of competitive glazing materials, such as tempered glass and plastics, the concern of laminated glass manufacturers for their product is understandable. It is difficult to assess how seriously the price change will affect the

market share of the 17 laminated glass manufacturers. However, there is some basis for suggesting that the laminated glass industry will maintain its overall market share.

First, the major share of the market held by the laminated glass industry as a whole is in the motor vehicle field. Since motor vehicles are not within the Commission's jurisdiction, automotive glazing materials are not subject to this standard. Secondly, some of the specialty laminated glass within the scope of the standard, and used, for example, for sound reduction, security, bullet proofing, light glare, and heat reduction can meet the Category II, 400 foot pound requirements at the present time.

In addition, it appears likely that the laminated glass industry will maintain its competitive advantage in the important replacement market which currently comprises more than half of all laminated glass sales for applications within the scope of the standard.

Tempered glass is cheaper than laminated glass. However, in much of the replacement market laminated glass has the price advantage over tempered glass since laminated glass can be installed almost immediately when needed, eliminating expensive board up charges which are associated with the extended delivery time of non-standard size tempered glass. With the increased cost of laminated glass in Category II applications caused by the standard, the price advantage of laminated glass over tempered glass in the replacement market is no longer certain. Nevertheless, estimates of board up costs associated with tempered glass (around \$80) and data on the incremental cost of laminated glass indicate that laminated glass is likely to retain its price advantage over tempered glass by a narrow margin under most conditions. An analysis of this advantage is included in

the Commission's Economic Impact Statement, dated December 14, 1976, which is included in the public record available in the Office of the Secretary of the Commission. Under certain conditions the price advantage of laminated glass could be lost, for example, if the variable board up costs are significantly below normal and the variable mark ups on laminated glass are on the high side. All in all, considering the relative price and the quick replacement advantage of laminated over tempered glazing material, there is reason to believe that laminated will not lose a significant share of the replacement market to tempered glass.

Laminated glass is currently priced about the same as plastics at the glazing dealer level. Both materials are used in the replacement market, since they can be easily stocked and readily cut to a custom size. An important use of laminated glass in the replacement market is for fixed panels in nonresidential entranceways. Presently, laminated is preferred to plastics in this use for esthetic reasons, for example, because it has better scratch resistance and is less likely to discolor. Considering the unique physical characteristics of laminated glass, it is unlikely that the price increase of laminated glass will cause it to lose a significant share of the replacement market to plastics.

In summary, if the laminated glass industry does double the thickness of the plastic interlayer for Category II applications in order to meet the standard, it appears likely that its market share generally will be maintained.

The effect of the standard will vary among the 17 U.S. firms that manufacture laminated glass. For most of these firms, laminated glass production affected by the standard would be well under 10 percent of the individual firm's total production of glazing materials, such as tempered, annealed glass and laminated glass unaffected by the standard. For at least one firm, the figure could

reach 25 percent. For the largest firms, the figure is near zero.

Finally, it should be pointed out that the standard could provide increased sales opportunities for laminated glass since noncomplying glazing material will relinquish its share of the replacement market.

b. Several commentors from the U.S. laminated industry expressed a concern that the proposed standard would lead to major foreign inroads.

The possibility of increased foreign competition exists regardless of a CPSC standard. It is the Commission's view that the effect of the standard on the import situation will be minimal since the manufacturing cost differential between domestic and foreign firms will remain nearly constant. The additional interlayer plastic material required to meet the standard's 400 ft lb test is nearly equally priced for domestic and foreign firms.

2. *Wired glass.* The C-E Glass Company commented that the proposed standard would have a deleterious economic effect on the wired glass industry.

[1439] After reviewing information presented by the commentor, and its own analysis, the Commission concludes that the proposed standard will cause serious economic disruptions in the wired glass industry because technological improvements in the product will need to be made before wired glass can be used in Category I (low energy) applications, and because it probably will not be usable at all in Category II (high energy) applications, because the product probably will not be able to pass the impact test of § 1201.4(d)(1). Other than for the effects on wired glass manufacturers, disruption will be minor in most markets where wired glass is incorporated into a consumer product, since in most applications a complying glazing material is readily available as a substitute for wired glass and wired glass is only 2

percent of the total glazing used in the U.S. annually. However, in the market for doors and assemblies intended to retard the passage of fire, the unique physical properties of wired glass appear to make it the only practical material at this time for use in fire doors.

Therefore, depending on the success the wired glass industry has in technologically improving its products, the disruption to the fire door and fire assembly market could be extremely significant.

The Commission, for reasons more fully discussed in section B above, has in the final standard revised the division line between Category I and Category II doors and glazed panels from 6 square feet to 9 square feet.

(See § 1201.2(a)(3) and (4).) As a result, wired glass for use in doors intended to retard the passage of fire would now generally only be subject to the 150 foot pound impact requirements of Category I. (§ 1201.4(d)(1).)

Nevertheless, as described earlier in this preamble, since it is doubtful that much wired glass can now comply with the 150 foot pound Category I impact test requirements, the Commission has concluded that there is good cause for deferring for a period of 2½ years application of the standard to wired glass intended to retard the passage of fire. This period will allow the industry time to develop the technology necessary to produce glazing materials for such applications which will meet Category I requirements, and will allow time to amend federal, state and municipal fire codes to permit the use of the improved glazing material. This decision is reflected in §§ 1201.1(c)(1) and 1201.7 of the final standard.

3. *Organic-coated glass.* Comments were submitted on the economic implications of the proposed standard with respect to organic-coated glass.

Applications of a polymer film to glazing already in place is a relatively new concept to the field of architectural glazing with significant benefits for consumers. It allows consumers to upgrade glazing material for safety or for energy economy without replacing glazing material already installed. Comments expressed concern that this benefit might be lost to consumers under the standard. However, since the application of polymer film to glazing already in place is not within the scope of the standard, the Commission does not expect this market to be disrupted.

In most currently marketed thicknesses, organic coated glass which has the film applied to annealed glass at the factory cannot meet the Category II impact requirements of § 1201.4(d)(1). Some members of the industry believe that a market limited to Category I products alone is too small and segmented to be profitable for most manufacturers. The revised upward division point between Category I and Category II doors, storm doors, and glazed panels in the final standard will ease this problem (see §§ 1201.2(a)(3) and (4)). It is not clear to what extent the factory produced organic coated glass market will be disrupted. However, the economic impact in relation to the entire glazing industry will be negligible, since this material accounts for less than $\frac{1}{3}$ of one percent of the total volume.

4. *Summary of economic impact.* The discussions above indicate that certain segments of the glazing industry are likely to be adversely affected by the standard. Specifically, there is likely to be disruption to the wired glass (other than fire door uses), the organic-coated glass market and, to a lesser extent, in the laminated glass market. However, these markets are small in relation to the entire industry. For the glazing industry in general, the disruptions and dislocations of existing manufacturing and commercial practices due to the standard are expected to be minor.

5. *Cost benefit analysis.* A comment received from the Council on Wage and Price Stability (CWPS) outlined a formal cost benefit analysis and urged that this approach be adopted by the Commission. While the Commission is required by section 9(c) of the CPSA, 15 U.S.C. 2058(c) to consider and make findings regarding certain economic matters, the act does not require the Commission to conduct a cost benefit analysis. The Commission has made the required findings in § 1201.1(d) of the standard and has discussed economic effects of the standard in this section of the preamble. Because important social costs and benefits have not been adequately identified and quantified in the present state of the art, the Commission believes that there are at this time substantial questions concerning the usefulness of cost benefit analysis when applied to product safety. However, the Commission has made certain cost benefit calculations, which are part of the public record.

In the comment, CWPS performed a rough calculation which indicated that the costs of the standard far exceed the benefits. The Commission believes that the CWPS calculation contains inadequacies and that CWPS has not supported its conclusion. Important benefits which are not easily quantifiable were ignored and implicitly assigned a value of zero; examples include savings to consumers due to reduced breakage of safety glazing, possible reduction in retail prices due to distribution efficiencies made possible by a uniform national standard, and social benefits from reduced pain and suffering. In addition, the calculation failed to recognize fully the need for dynamic analysis when considering both cost and benefit streams over a period of time.

Other potential economic effects of the standard taken into account by the Commission are discussed in an economic analysis prepared by the Commission and the findings set forth in § 1201.1(d) of the standard. A copy

of the Commission's Economic Impact Statement is included in the public record and may be seen in the Office of the Secretary.

F. *Stockpiling.* Section 1201.6 of the proposed standard set forth provisions relative to what the Commission considered to be prohibited acts of stockpiling within the scope of section 9(d)(2) of the CPSA (15 U.S.C. 2058 (d)(2)). This section authorizes the Commission to prohibit manufacturers from stockpiling a product subject to a consumer product safety standard between issuance of the final standard and its effective date. Stockpiling is defined as manufacturing or importing of a product during this time period at a rate significantly greater than the rate at which the product was produced or imported during a base period (set by rule) ending prior to the promulgation date.

The proposed stockpiling provision, § 1201.6, specified that manufacturers, fabricators, and importers of certain architectural products who incorporate glazing material into those products shall not incorporate glazing materials which do not comply with the requirements of the standard between the date the final standard is issued and the date the standard becomes effective, at a rate which is greater than the rate of production or importation during the base period plus ten percent.

The Consumer Safety Glazing Committee, the Glass Division of the Ford Motor Company, and the Glass Tempering Association commented that the fixed base period dates proposed in § 1201.6(c)(2) were inappropriate. The Commission believes that the fixed base period dates were appropriate for the proposed standard, and the earlier timetable for publication of the final standard. However, the intent of the stockpiling provision is to prevent a manufacturer from circumventing the purpose of a consumer product safety rule while permitting the manufacturer to continue at production

rates that would have been typical in the absence of a rule. Therefore, it is appropriate for a base period to be set that takes into account the publication date of the standard. The Commission, therefore, has determined that the stockpiling provision be modified to provide for a base period related to the publication date as set forth below at § 1201.6.

IV. OTHER CONSIDERATIONS

A. *Environmental effects of the standard.* Prior to publishing the proposed standard, the Commission considered the [1440] environmental effects of its action and determined that there was no potentially significant environmental effect associated with the implementation of the proposed standard. Because the factors leading to this determination have not changed as a result of any changes, additions, or corrections made in the standard as adopted below, and in view of its Economic Impact Statement of December 14, 1976, the Commission reaffirms its decision that there is no potentially significant environmental effect associated with the promulgation of the standard. The factors leading to the original determination were set forth in an environmental assessment of the proposed standard which may be seen in the Office of the Secretary.

B. *Certification and labeling.* 1. Comments were received from the Consumer Safety Glazing Committee and PPG Industries requesting the Commission to specify in the final standard a reasonable testing program for purposes of certifying that glazing materials and products subject to the standard comply with its requirements; and to include provisions within the standard for certification and labeling of glazing materials and products for compliance with the standard. Associated Laboratories recommended that the Commission include in the provisions of the final standard a specification of the number

of specimens which must be tested to determine compliance with the standard. Ford Motor Company's Glass Division requested the Commission to issue product identification labeling provisions pursuant to section 14(c) of the CPSA. Additional comments and suggestions with respect to numbers of specimens, certification, and labeling were submitted by the Glass Tempering Association, the Flat Glass Marketing Association, the Plastic Safety Glazing Committee, PPG Industries, the Anderson Manufacturing Company, Rohm and Haas Company, the Fourco Glass Company, and Sheffield Poly-Glaz, Inc.

The standard does not impose any testing requirements upon manufacturers of glazing materials. However, section 14(a) of the CPSA requires manufacturers and private labelers of products subject to standards to issue certificates of conformance, based on a test of each product or upon a reasonable testing program. Section 14(b) authorizes the Commission to prescribe by rule reasonable testing programs. The Commission anticipates issuing such a rule under the authority of section 14(b). The rule will be issued in accordance with 5 U.S.C. 553 (Administrative Procedure Act).

In issuing a rule under section 14, the Commission will consider, among other things, such matters as the number of specimens to be tested in any reasonable testing program, possible alternative tests that industry members might conduct, existing third party certification, and labeling both before and after the glazing material has been cut. It is anticipated that such a regulation will be issued prior to the effective date of the architectural glazing material standard to become effective at the same time as the standard. If it appears that the certification rule under section 14 could not be made effective at the same time as the standard, the Commission will consider an extension in the effective date of the standard.

2. Ford Motor Co. and the Glass Tempering Association requested that provision be made for permitting the use of glazing materials after the effective date of the standard which were certified to comply with previously existing standards, but which also might meet the requirements of Part 1201. The Commission believes that the effective date of the standard contains an adequate lead time for fabricators to exhaust supplies of glazing material that have not been certified as complying with the standard and for glazing material manufacturers to provide glazing materials which have been certified as complying with the standard. However, the Commission will consider these concerns in the development of the certification and labeling regulation.

C. *Preemption.* The City of Phoenix, Arizona questioned the wisdom of the Commission's preempting local requirements for architectural glazing material.

Section 26(a) of the Act (15 U.S.C. 2075(a)) provides that whenever a consumer product safety standard issued under the act is in effect and applies to a risk of injury associated with a consumer product, no state or political subdivision of a state shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such products which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the standard promulgated under the act. This means, in effect, that most state standards in existence that are applicable to the same products and risks of injury subject to regulation under the standard will be completely or substantially preempted by the CPSC standard upon its effective date. Such state standards that address the same risks of injury dealt with by the

federal standard must be identical to the federal standard to remain in effect. Thus, the act gives the Commission no discretion to avoid preemption of state and local regulations. It is the view of the Commission, however, that the preemption provisions of the Consumer Product Safety Act would not apply to those products exempted from the scope of this standard by § 1201.1(c).

Section 26(c) of the act as amended (15 U.S.C. 2075 (c)), however, provides that upon application of a state or political subdivision thereof, the Commission may by rule, after notice and opportunity for oral presentation of views, exempt from the preemption provisions of section 26(a) (under such conditions as the Commission may impose) a proposed safety standard or regulation described in the application for exemption and which is designed to protect against a risk of injury associated with a consumer product subject to a consumer product safety standard. In such cases, the Commission must find that the proposed standard or regulation (1) provides a significantly higher degree of protection from such risk of injury than the consumer product safety standard under the act, and (2) does not unduly burden interstate commerce. Thus, states and local governments may apply to the Commission for exemption from preemption.

D. Jurisdiction. One commentator raised the question of what product the Commission is regulating in its proposed standard, and alleges that there are serious questions about the Commission's jurisdiction over glazing material used in the architectural products identified in the standard.

The consumer products that are the subject of the Commission's standard are the architectural glazing material itself used in storm doors or combination doors, doors, bathtub doors and enclosures, shower doors and enclosures, glazed panels and sliding glass doors (patio-

type). In addition, the standard applies to the above enumerated architectural products in which the glazing material is incorporated, in that those products must be constructed of glazing material that complies with the standard.

In regard to the question of jurisdiction, it is the Commission's view that the architectural glazing material and the architectural products in which the glazing material is incorporated is produced or distributed for sale to and/or use or enjoyment of consumers in or around a permanent or temporary household or residence, a school, in recreation, or otherwise. Thus, the glazing material and architectural products subject to the standard are consumer products and within the jurisdiction of the Commission.

E. Reference standards. Certain voluntary standards have been referenced in this Part 1201. The references pertain to the voluntary standards issued on the cited dates, and not to any prior or subsequent revisions. Revisions to those reference standards would not be incorporated into the standard unless the Commission amends the standard to incorporate these revisions.

G. Metric conversions. This standard was developed using the English system of units. Metric equivalents have been included in the text of the standard for convenience. Metric equivalents have not been added to illustrations 1 through 5. The conversion factors to be used there are:

1 inch = 2.54 centimeters.

1 pound = .4536 kilograms.

H. Elderly and handicapped. Section 9(b) of the act, 15 U.S.C. 2058(b), as amended, requires the Commission to consider and take into account the special needs of elderly and handicapped persons to determine the extent

to which such persons may be adversely affected by the standard. The Commission has [1441] done so and determined that no such adverse effect will result from the issuance of the standard, because it is unaware of any situation where an elderly or handicapped person would sustain injuries of greater severity because safety glazing had been present, or would be inconvenienced by the presence of safety glazing. To the extent that the elderly and handicapped may be likely to push on glazing to operate doors, their protection would be the same or greater as other persons.

I. *Findings.* Section 9(c) of the CPSA requires that prior to promulgating a consumer product safety rule the Commission shall consider, and shall make appropriate findings for inclusion in such a rule as to: (1) The degree and nature of the risk of injury the rule is designed to eliminate or reduce; (2) the approximate number of consumer products, or types or classes thereof, subject to such rule; (3) the need of the public for the consumer products subject to such rule, and the probable effect of such rule upon the utility, cost, or availability of such products to meet such need; (4) any means of achieving the effect of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety; (5) that the rule is reasonably necessary to eliminate or reduce an unreasonable risk associated with such products; and (6) that the promulgation of the rule is in the public interest (15 U.S.C. 2058(c)).

The findings required by section 9(c) of the act have been made by the Commission and are incorporated in § 1201.1 below.

V. MISCELLANEOUS

In response to a number of comments which were received suggesting editorial changes, and upon its own

review, the Commission has made certain revisions in the final standard. Among these changes are the following:

1. Wired glass and annealed glass have been added to the list of products in Table 1 of the final standard, with a notation that both are exempt from the environmental durability tests.

2. The definition of laminated glass contained in proposed § 1201.2(a)(12) has been modified to make it clear that laminated wired glass is to be considered laminated glass. (See § 1201.2(a)(13) of the final standard).

3. A compression tolerance of 10 percent to 15 percent has been added to § 1201.4(b)(1)(v) and to Figure 3.

4. In proposed § 1201.2(a)(31), now set out at § 1201.2(a)(33), the term “* * * properly tempered * * *” has been revised to “* * * highly tempered * * *”, and the term “granular pieces” has been revised to read “particles”.

5. The latter portion of proposed § 1201.4(b)(1)(i) has been deleted beginning with “* * * except that impact test frames * * *” to reflect that the Commission will only use test frames manufactured to the specifications of the standard.

6. One commenter, the Plastic Safety Glazing Committee, recommended the deletion of the term “Accelerated” from the title heading of § 1201.4(d)(2)(ii) which is “Accelerated weathering test.” The Commission has not made this change because all of the testing specified in this section is, in fact, accelerated. Use of the term “accelerated” in this context is consistent with the practice of the National Bureau of Standards.

7. Proposed § 1201.4(e)(1)(i)(D), now set out as §§ 1201.4(e)(1)(iv) and (v), provides criteria for pass-

ing the impact test. It has been revised first to state more clearly that a specimen is considered to pass the test if "The specimen does not remain within the sub-frame and no breakage is caused by the impactor" (§ 1201.4(e)(1)(iv)). This revision covers those situations where the glazing material comes out of the frame upon impact. A new paragraph § 1201.4(e)(1)(v) has been added, to provide the other criterion which was set out in proposed § 1201.4(e)(1)(D). The new paragraph states, "The specimen does not break."

8. The definition of glazed panel, § 1201.2(a)(10)(1), pertaining to glazed panels in residential buildings, has been revised so that the definition includes any panel whose nearest vertical edge is within 12 inches of the door rather than only the first panel. This change is consistent with the intent of the Commission to apply the standard to all glazed panels beginning within 12 inches of a door in residential buildings.

9. The labeling language of proposed § 1201.5(c) has been revised to read "Glaze this side in" and now conforms with ANSI Z97.1-1975 entitled "Performance Specifications and Methods of Test for Safety Glazing Material Used in Buildings", September 26, 1975, approved and published by American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018.

10. Definitions for "jalousie door" and "leaded glass" have been added as §§ 1201.2(a)(12) and (14), and in proposed § 1201.2(a)(25), now set out as § 1201.2(a)(27), the definition of residential buildings, has been revised to additionally include "* * * any structure which is attendant to, a part of, or appurtenant to" the buildings described in the definition. Other definitions have been renumbered as necessary.

11. In response to comments submitted by Phenix Manufacturing Co. and Ford Motor Co., 1201.1(b) has been revised to make clear that Part 1201 does not apply to glazing materials manufactured on or before the effective date of the standard. However, architectural products enumerated in the standard that are manufactured after the effective date must incorporate glazing materials that comply with the standard.

CONCLUSION

Having considered the offeror's submission, the published proposal, the oral and written response to the proposal, and other relevant material, the Commission issues the safety standard for architectural glazing materials as set forth below:

Therefore, pursuant to provisions of the Consumer Product Safety Act (Sec. 9(a), Pub. L. 92-573, 86 Stat. 1215; 15 U.S.C. 2058(a)), a new Part 1201 is added to Title 16, Chapter II, Subchapter B, as follows:

Sec.

- 1201.1 Scope, application and findings.
- 1201.2 Definitions.
- 1201.3 General requirements.
- 1201.4 Test procedures.
- 1201.5 Certification and labeling requirements.
- 1201.6 Prohibited stockpiling.
- 1201.7 Effective date.

AUTHORITY: Secs. 2, 3, 7, 9, 14, 19, Pub. L. 92-573, 86 Stat. 1212-17; (15 U.S.C. 2051, 2052, 2056, 2058, 2063, 2068).

§ 1201.1 Scope, application and findings.

(a) *Scope.* This Part 1201, a consumer product safety standard, prescribes the safety requirements for glazing

materials used or intended for use in any of the following architectural products:

- (1) Storm doors or combination doors.
- (2) Doors.
- (3) Bathtub doors and enclosures.
- (4) Shower doors and enclosures.
- (5) Glazed panels.
- (6) Sliding glass doors (patio-type).

It also requires that these architectural products which incorporate glazing materials be constructed with glazing materials that meet the requirements of this part. The safety requirements are designed to reduce or eliminate unreasonable risks of death or serious injury to consumers when glazing material is broken by human contact.

(b) *Application.* This Part 1201 shall apply to glazing materials for use in the architectural products listed in paragraph (a) of this section and to those architectural products listed in paragraph (a) of this section if they are made with or incorporate glazing materials. The standard applies to glazing materials and architectural products incorporating glazing materials that are produced or distributed for sale to or for the personal use, consumption or enjoyment of consumers in or around a permanent or temporary household or residence or in recreational, school, public, or other buildings or parts thereof. This Part 1201 applies only to those glazing materials manufactured after the effective date of the standard; and to those architectural products identified in paragraph (a) of this section that are manufactured after the effective date of the standard. Thus, architectural products identified in paragraph (a) of this section manufactured after the effective date of the standard must incorporate glazing materials that comply with

the standard. For purposes of this standard, fabricators and persons who assemble glazed panels are considered to be manufacturers of the architectural products listed in paragraph (a) of this section. Architectural glazing materials used in the products listed in paragraph (a) of this section and used in mobile homes are not subject to the [1442] provisions of this Part 1201. While this Part 1201 prescribes a test method to determine whether glazing materials subject to this Part 1201 standard meet the requirements of the standard, the standard itself does not require that a manufacturer test any glazing materials or products subject to the standard. All obligations of manufacturers to perform testing are imposed by section 14 of the Consumer Product Safety Act and certification regulations which will be established by a separate rulemaking proceeding. However, the Commission intends to use the test procedures set forth in this Part 1201 to determine whether materials and products subject to the standard meet the requirements of the standard.

(c) *Exemptions.* The following products, materials and uses are exempt from this Part 1201:

(1) Wired glass used in doors or other assemblies to retard the passage of fire, where such door or assembly is required by a federal, state, local or municipal fire ordinance, except that this exemption shall terminate on January 6, 1980.

(2) Louvers of jalousie doors;

(3) Openings in doors through which a 3 inch diameter sphere is unable to pass;

(4) Leaded glass panels where no individual piece of glass has an area greater than 30 square inches;

(5) Glazing materials used as curved glazed panels in revolving doors;

(6) Commercial refrigerated cabinet glazed doors.

(d) *Findings*—(1) *The degree and nature of the risk of injury the rule is designed to eliminate or reduce.* The Commission finds that the nature of the risks of injury this standard is designed to eliminate or reduce are as follows:

(i) Lacerations, contusions, abrasions, and other injury or death resulting from walking or running into glazed doors or sliding glass doors believed to be open or glazed panels mistaken as a means of ingress or egress, or pushing against glazing material in doors or glazed panels in an attempt to open a door.

(ii) Lacerations, contusions, abrasions, and other injury or death resulting from accidentally falling into or through glazed doors, sliding glass doors, glazed panels, bathtub doors and enclosures and shower doors and enclosures.

(iii) Lacerations, contusions, abrasions, and other injury or death resulting from the act of installing, replacing, storing or otherwise manipulating glazing material in doors, sliding glass doors, glazed panels, bathtub doors and enclosures and shower doors and enclosures, or from broken glazing material in doors, sliding glass doors, glazed panels, bathtub doors and enclosures and shower doors and enclosures. The Commission estimates that 73,000 injuries associated with architectural glazing materials in the architectural products within the scope of this standard were treated in hospital emergency rooms during 1975, and that about 2,400 of these injuries required the patients to be hospitalized. Extrapolating to total injuries in the United States the Commission further estimates that approximately 190,000 injuries were associated with architectural glazing products covered by this standard. Although injuries occur at any age,

children aged 14 and under appear to be at particular risk of injury since as a group they represent approximately half the injuries while comprising less than 30 percent of the population. Lacerations are the most common injuries associated with architectural glazing materials and account for 72 percent to 93 percent of the injuries associated with the architectural products identified in paragraph (a) of this section. These lacerative injuries span a broad spectrum of severity and extent of body part affected. During 1975, an estimated 200 injuries were treated in emergency rooms for lacerations over 25 to 50 percent of the victims' bodies and over 7,000 persons were treated for lacerations to the head or face. On the basis of all injury information available to the Commission, it is apparent that the severity of the injuries associated with architectural glazing materials ranges from minor cuts to damage to tendons, nerves, muscles, and blood vessels resulting in extensive surgery. Peripheral nerve injuries result in varying degrees of loss in sensation and motion which may never be restored completely. Tendon and muscle injuries may involve loss of movement. Some victims of architectural glazing material incidents are disfigured, and sustain emotional trauma as well. Severing of arteries and veins has led to death. One way of quantifying the extent of the public health problem relating to injuries associated with products is to estimate the total number of disability days resulting from the injuries. Using average days of restricted activity by age for specific injuries and body parts (Vital and Health Statistics, Series 10, Number 57, National Center for Health Statistics, U.S. Department of Health, Education, and Welfare), it is estimated that about 230,000 days of restricted activity resulted from injuries associated with architectural products which were treated in emergency rooms alone.

(2) *The approximate number of consumer products, or types or classes thereof, subject to the standard.* The types of glazing materials affected by or subject to the standard are laminated glass, tempered glass, wired glass, organic-coated glass, annealed glass, and plastics. Architectural products that incorporate the aforementioned glazing materials that are also affected by or subject to the standard are: storm doors or combination doors, doors, bathtub doors and enclosures, shower doors and enclosures, glazed panels and sliding glass doors (patio-type) (see paragraph (a) of this section). The Commission has estimated that 13 to 16 percent of the total market for glazing material incorporated in products within the scope of the standard will be affected by the standard. Most of the glazing subject to the standard is currently covered by state safety glazing legislation. To date, more than 30 states have enacted safety glazing legislation, but this legislation is neither consistent nor completely uniform among states. Annual markets for the architectural products which incorporate glazing material and that are within the scope of the standard have been estimated by the Commission in terms of square feet of glazed area and number of units. The market for glazing material incorporated in products within the scope of the standard was estimated to be 234.8 million square feet in 1975. These figures are discussed in the Economic Impact Statement, pp. 3-7, and Appendix A to the Economic Impact Statement, pp. 18-30, which are available for review in the Office of the Secretary of the Commission, Washington, D.C. 20207.

(3) *The need of the public for the architectural glazing material and products incorporating that glazing material subject to the standard, and the probable effect of the standard upon the utility, cost or availability of those products to meet the need of the public—*(i) *The need of the public for the architectural glazing materials and products incorporating that glazing material.* The

need of the public for architectural products within the scope of the standard incorporating glazing material is substantial since these products serve such functions as transmission of light, visual communication, protection from weather, ventilation, and indoor climate control, and since reasonable substitutes for these products do not exist as a group. Each of the types of glazing material subject to the standard has individual properties which meet public needs, although one type of glazing material is often an acceptable substitute for another.

(ii) *Probable effect of the standard upon the cost of architectural glazing materials and architectural products incorporating the glazing material to meet the need of the public for the products.* The probable cost effects of the standard for architectural glazing materials are listed below.

(A) The cost impact of the standard on consumers will be concentrated in those states with no present state safety glazing legislation. In those states, the average increase in cost per housing start resulting from the standard is estimated to range from \$30 to \$50, or approximately one-tenth of one percent of the price of a typical new house; and the cost for residential remodeling and replacement is expected to be in the range of \$0.25 to \$0.30 per household annually.

(B) The increased cost of glazing material for non-residential uses will be paid ultimately by consumers through higher prices of goods and services. Generally, the increased cost of glazing is not passed to consumers immediately, but is spread over the life of the nonresidential structure. Therefore, the increased cost to consumers for glazing material in nonresidential structures will probably rise slowly over time to an annual level of approximately \$1.10 per household in states with no safety glazing legislation and \$0.20 to \$0.50 per household in the other states. In many of the states with state

regulations, the impact of the standard on residential construction and new housing prices will be near zero, [1443] since most of the glazing is currently covered by the state glazing legislation.

(C) The probable effect of the standard on the various glazing materials within the scope of the standard will differ. The retail price of laminated glass used in some Category II applications will probably increase by 10 to 15 percent per square foot. The incremental cost to consumers for ungraded laminated glass is estimated to be approximately \$0.14 per household, annually. The cost to consumers for tempered glass, organic-coated glass, and plastics is not expected to increase because of the standard. Information available to the Commission indicates that the technology needed for producing wired glass which can comply with the standard is not readily available. See Appendix A of the Economic Impact Statement, pp. 45-56, for the incremental cost calculation by product category and application.

(iii) *Probable effect of the standard upon the utility of architectural glazing materials and architectural products incorporating the glazing materials to meet the need of the public for the products.* The probable effect of the standard in regard to the utility of architectural glazing materials and the architectural products incorporating glazing material should be to increase the utility of the products. The basic effect of the standard would be the substitution of certain safer glazing materials for annealed glass in certain architectural products. The Commission believes that such a substitution would increase utility for most consumers because of the usually increased durability of the glazing material that complies with the Commission's standard, and the knowledge that the product incorporating the glazing material is safer. There will be disutility for those consumers who prefer non-complying wired glass and organic-coated

glass when these materials become unavailable for certain applications due to their likely inability to comply with the standard. However, the share of the glazing material market claimed by organic-coated and wired glass is small.

(iv) *Probable effect of the standard upon the availability of architectural glazing materials and architectural products incorporating the glazing materials to meet the need of the public for the products.* The Commission finds that the proposed standard should not have impacts of significant magnitude on the availability of architectural products within the scope of the standard, since domestic production capacity appears to be sufficient to handle any increased demand for glazing material to be used in those products. In addition, an increased demand for raw materials necessary to manufacture glazing materials that comply with the standard will be small in comparison to the volume of raw materials currently used for glazing for the products that will be subject to the standard. Furthermore, no major change in demand for the architectural products subject to the standard incorporating glazing materials which would affect production is expected. The Commission finds that, in the absence of technological advances, certain glazing materials will no longer be available for particular applications. Unless technological advances are made, wired glass will be unavailable for use in the architectural products within the scope of the standard with the exception of fire door applications where special provisions of the standard apply. Similarly, organic-coated glass which has the film applied to annealed glass at the factory may no longer be available for Category II products due to an inability to pass those impact test provisions of the standard. The availability of glass replacement glazing in residential applications may be reduced, since plastic glazing will be the only economical material available to consumers when immediate replacement is needed.

(4) *Any means of achieving the objectives of the standard while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety.* The Commission has considered other means of achieving the objective of the standard, but has found none that it believes would have fewer adverse effects on competition or that would cause less disruption or dislocation of manufacturing and other commercial practices, consistent with the public health and safety. For the glazing industry in general, the disruptions and dislocations of existing manufacturing and commercial practices due to the standard are expected to be minor. However, it is possible that individual segments of the glazing materials industry are likely to be adversely affected by the standard. Specifically, there is likely to be disruption to the wired glass market, the organic-coated glass market and, to a lesser extent, to the laminated glass market. Manufacturers of wired glass will face a serious problem because technological improvements in the product will need to be made before wired glass can be used in Category I applications and because it probably will not be usable at all in Category II applications (see § 1201.2(a)(3) and (4) of the standard), since there appears to be little prospect at this time of developing a wired glass product capable of withstanding the Category II 400 foot pound impact test prescribed in § 1201.4 of the standard. Laminated glass currently used for Category I applications can meet the 150 foot pound impact test requirements, but not all laminated glass currently used for Category II applications can meet the 400 foot pound impact test requirements. The price increase for technologically upgrading laminated glass will be borne by consumers. The Commission believes, however, that the competitive impact of the proposed changes would not severely weaken the position of laminated glass in the market place. The wired glass,

organic-coated glass, and laminated glass markets affected by the standard are small in relation to the entire industry. The standard is not expected to have an appreciable impact on foreign or domestic competition. Increased competition is expected between primary glass temperers and regional temperers, with primary temperers taking an increased share of the original storm door, sliding door, bathtub enclosure and shower door markets. Sales of nonresidential glazing for major nonresidential buildings will remain with the primary glass companies. The regional temperers are expected to handle almost all the tempering of glazing for smaller nonresidential buildings. Thus, they will gain some of this market at the expense of local dealers and distributors. However, the distributors and dealers probably will operate as order takers for the smallest jobs. It is expected that glazing distributors and dealers will experience reduced market shares in both the residential and nonresidential new glazing markets. This will occur as a result of the transfer of business to the primary glass manufacturers and regional temperers, since tempered glass must be produced to size and it is not feasible to keep in inventory all sizes which might be needed.

(5) *Summary finding.* The Commission finds that there are unreasonable risks of injury associated with architectural glazing materials used in the architectural products listed in paragraph (a) of this section. In assessing the question of whether unreasonable risks of injury or injury potential are associated with architectural glazing materials, the Commission has balanced the degree, nature and frequency of injury against the potential effect of the standard on the ability of architectural glazing materials to meet the need of the public and the effect of the standard on the cost, utility, and availability of architectural glazing materials to meet that need. The Commission finds that this standard, including its effective date, is reasonably necessary to elimi-

nate or reduce the unreasonable risks of injury associated with architectural glazing materials and that promulgation of the standard is in the public interest.

§ 1201.2 Definitions.

(a) As used in this Part 1201:

(1) "Annealed glass" means glass that has been subjected to a slow, controlled cooling process during manufacture to control residual stresses so that it can be cut or subjected to other fabrication. Regular polished plate, float, sheet, rolled, and some patterned surface glasses are examples of annealed glass.

(2) "Bathtub doors and enclosures" means assemblies of panels and/or doors that are installed on the lip of or immediately surrounding a bathtub.

(3) "Category I products" means any of the following architectural products:

(i) Storm doors or combination doors that contain no single piece of glazing material greater than 9 square feet (0.83 square meters) in surface area of one side of the piece of glazing material.

(ii) Doors that contain no single piece of glazing material greater than 9 square feet (0.83 square meters) in surface area of one side of the piece of glazing material.

(iii) Glazed panels that contain no single piece of glazing material greater [1444] than 9 square feet (0.83 square meters) in surface area of one side of the piece of glazing material.

(4) "Category II products" means any of the following architectural products:

(i) Shower doors and enclosures.

(ii) Bathtub doors and enclosures.

(iii) Sliding glass doors (patio type).

(iv) Storm doors or combination doors that contain any piece of glazing material greater than 9 square feet (0.83 square meters) in surface area of one side of the piece of glazing material.

(v) Doors that contain any piece of glazing material greater than 9 square feet (0.83 square meters) in surface area of one side of the piece of glazing material.

(vi) Glazed panels that contain any piece of glazing material greater than 9 square feet (0.83 square meters) in surface area of one side of the piece of glazing material.

(5) "Distributor" means a person to whom a consumer product is delivered or sold for purposes of distribution in commerce, including persons cutting glazing material to size, except that such term does not include a manufacturer or retailer of such product.

(6) "Distribution in commerce" means to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.

(7) "Door" means an assembly that is installed in an interior or exterior wall; that is movable in a sliding, pivoting, hinged, or revolving manner of movement; and that is used by consumers to produce or close off an opening for use as a means of human passage.

(8) "Fabricator" means any person who assembles or otherwise incorporates glazing materials into an architectural product listed in § 1201.1(a). A fabricator is considered a manufacturer as defined in paragraph (a) (16) of this section.

(9) "Glass" means a hard, brittle, amorphous substance produced by fusion, usually consisting of mutually

dissolved silica and silicates that also contains sods and lime. It may be transparent, translucent, or opaque.

(10) "Glazed panel" means a glazing material used in any building listed in § 1201.1 (b) that is:

(i) In residential buildings, any piece of operable or nonoperable glazing material adjacent to a door whose nearest vertical edge is within 12 inches (31 centimeters) from the door in a closed position, and whose bottom edge is below the level of the top of the door; or

(ii) In all buildings other than residential buildings, any piece of operable or nonoperable glazing material adjacent to a door whose nearest vertical edge is within 48 inches (1.2 meters) from the door in a closed position and whose bottom edge is below the level of the top of the door; or

(iii) In all buildings other than residential buildings, all panes not described in paragraph (a) (10) (ii) of this section where:

(A) The lowest edge of the glazing material is less than 18 inches (46 centimeters) above any floor or any walking surface; and

(B) The exposed glazing material in such panel exceeds 9 square feet (0.3 square meters); and

(C) There is a walking surface on both sides, either of which is within 36 inches (92 centimeters) of such panel and the horizontal planes of such walking surfaces are within 12 inches (31 centimeters) of each other.

(iv) Not included in the definition of glazed panels are:

(A) Panels where an intervening interior permanent wall is between the door and the panel(s) described in paragraph (a) (10) (ii) of this section;

(B) Panels described in paragraph (a) (10) (iii) of this section that have a horizontal member such as a piece of the framing or permanent chair rail no less than 1½ inches (4 centimeters) in width, which is located between 24 and 36 inches (61 and 91 centimeters) above the walking surface.

(11) "Glazing material" means plastics, glass, including annealed glass, organic-coated glass, tempered glass, laminated glass, wired glass; or combinations thereof where these are used:

(i) In openings through the architectural products listed in § 1201.1 (a), or

(ii) As the architectural products themselves, e.g., glazed panels or unframed doors.

(12) "Jalousie door" means a door (as "door" is defined in paragraph (a) (7) of this section) having an opening glazed with operable, overlapping louvers. Each louver is one of a series of overlapping pieces of glazing material designed to admit ventilation and light but exclude rain and is typically operated by a crank and gear mechanism.

(13) "Laminated glass" means glazing material composed of two or more pieces of glass, each piece being either tempered glass, heat strengthened glass, annealed glass or wired glass, bonded to an intervening layer or layers of resilient plastic material.

(14) "Leaded glass" means a decorative composite glazing material made of individual pieces of glass whose circumference is enclosed by lengths of durable metal such as lead or zinc and the pieces of glass are completely held together and supported by such metal.

(15) "Manufacture" means to manufacture, produce or assemble.

(16) "Manufacturer" means any person who manufactures, fabricates or imports a glazing material or architectural product listed in § 1201.1(a) that incorporates glazing material.

(17) "Mirror" means a treated, polished or smooth glazing material that forms images by the reflection of light.

(18) "Mobile home" means a structure transportable in one or more sections, which is eight body feet (2.4 body meters) or more in width and is thirty-two body feet (9.7 body meters) or more in length, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities.

(19) "Other buildings or parts thereof" means buildings or parts thereof (other than residential, school, public, or recreational buildings) in which all or part of the building is open to the public with or without specific invitation. Included are buildings or parts thereof such as banks and recreational or retail facilities in a building and multiuse buildings that contain residential units.

(20) "Organic-coated glass" means a glazing material consisting of a piece of glass, coated and bonded on one or both sides with an applied polymeric coating, sheeting, or film.

(21) "Patio door" (See "sliding glass doors (patio-type)" in paragraph (a) (31) of this section).

(22) "Permanent label" means a label that will remain permanently legible and visible after installation of the glazing material and that would be destroyed in attempts to remove it from the glazing material and includes (but is not limited to) sandblast, acid etch, hot-stamp, and destructible polyester labels.

(23) "Plastic" means a single sheet of organic glazing material, a combination of two or more such sheets laminated or coextruded together, or a combination of such sheets and reinforcement material in the form of fiber or flakes.

(24) "Private labeler" means an owner of a brand or trademark on the label of a consumer product which bears a private label, and includes any fabricator, distributor, or installer who cuts certified and permanently labeled glazing materials into smaller pieces.

(25) "Public building" means a building of public assembly or meeting including (but not limited to) a museum, place of worship, or restaurant.

(26) "Recreational building" means a building used for recreational purposes including (but not limited to) a theater, stadium, gymnasium, amusement park building or library.

(27) "Residential building" means a building, permanent or temporary, such as a single or multifamily residence, including (but not limited to) a house, apartment building, lodging home, dormitory, hotel, motel, hospital, sanitarium, and nursing home, used as a dwelling for one or more persons or families and any structure which is attached to, a part of, or appurtenant to such a building. Public areas of all residential buildings, such as lobbies and other common facilities, are included within the definition of "other buildings or parts thereof" in paragraph (a) (19) of this section. For purposes of this Part 1201, a mobile home as defined in paragraph (a) (18) of this section is not considered to be a residential building.

(28) "Retailer" means a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer; the term retailer includes a person who cuts glazing material to size for consumers.

(29) "School building" means a building designed primarily for the conduct of educational instruction and includes the [1445] classrooms, libraries, administrative offices, auditoriums, eating and sanitary facilities, stadiums, gymnasiums and all other structures associated with such buildings.

(30) "Shower door and enclosure" means an assembly of one or more panels installed to form all or part of the wall and or door of a shower stall.

(31) "Sliding glass door (patio-type)" means an assembly of one or more panels, at least one of which is suitably movable for use as a means of human ingress or egress. The term includes the nonmovable and movable panels of such assembly.

(32) "Storm door (or combination door)" means a movable assembly, used in tandem with an exterior door to protect the exterior door against weather elements and/or to improve indoor climate control.

(33) "Tempered glass" means a piece of specially heat treated or chemically treated glass that cannot be cut, drilled, ground, or polished after treatment without fracture. When fractured at any point, if highly tempered, the entire piece breaks into small particles.

(34) "Wired glass" means a single piece of annealed glass that contains wire embedded in the body of the glass.

(35) "Commission" means the Consumer Product Safety Commission.

(b) Definitions given in the Consumer Product Safety Act, and not repeated in this section, are applicable to this Part 1201.

(c) Test methods and recommended practices published by the American Society for Testing and Materials

(ASTM), and referred to in this Part 1201, are hereby incorporated by reference into this Part 1201.¹

§ 1201.3 General requirements.

(a) All glazing materials to which this standard applies, as described in § 1201.1, shall meet the impact and environmental test requirements in § 1201.4 and shall be labeled by manufacturers in accordance with § 1201.5.

(b) Glazing materials used in architectural products not listed in § 1201.1(a) are not subject to this Part 1201.

§ 1201.4 Test procedures.

(a) *Types of tests*—(1) *Impact test*. Specimens shall be struck as prescribed by paragraph (d) (1) of this section using equipment specified by paragraphs (b) (1) and (2) of this section. Results of the impact test are to be interpreted in accordance with paragraph (e) (1) of this section. The test specimens shall be selected in accordance with paragraph (c) (1) and (2) of this section.

(2) *Accelerated environmental durability tests*. Each specimen of glazing material subject to this Part 1201 shall be tested in accordance with the accelerated tests reference in table 1, "Accelerated Tests" of this section. However, tempered glass, wired glass, and annealed glass are not required to be subjected to the accelerated environmental durability tests.

¹ ASTM test methods and recommended practices are approved by, published by, and available for purchase from the American Society for Testing and Materials, 1916 Race Street, Philadelphia, Pennsylvania 19103.

TABLE 1.—Accelerated tests (applicable paragraphs)

Glazing material	Specimen	Test equipment	Exposure	Criteria for passing
Laminated glass	Sec. 1201.4(c)(1) and (c)(3)(i)	Sec. 1201.4(b)(3)(i)	Sec. 1201.4(d)(2)(i)	Sec. 1201.4(e)(2)(i)
Organic-coated glass	Sec. 1201.4(c)(1) and (c)(3)(ii)(B)	Sec. 1201.4(b)(3)(ii)	Sec. 1201.4(d)(2)(ii)(B)	Sec. 1201.4(e)(2)(ii)(B)
Plastics	Sec. 1201.4(c)(1) and (c)(3)(ii)(A)	Sec. 1201.4(b)(3)(ii)	Sec. 1201.4(d)(2)(ii)(A)	Sec. 1201.4(e)(2)(ii)(A)
Plastics (indoor)	Sec. 1201.4(c)(1) and (c)(3)(iii)	Sec. 1201.4(b)(3)(iii)	Sec. 1201.4(d)(2)(iii)	Sec. 1201.4(e)(2)(ii)(C)
Tempered glass	Exempt	Exempt	Exempt	Exempt
Wired glass	do	do	do	Do
Annealed glass	do	do	do	Do

(3) Separate testing is required for different materials or for differences within a type of glazing material that could noticeably affect performance in the impact or environmental durability tests. Such differences could include (but are not limited to): Nominal thickness or thicknesses, method of manufacture (in appropriate cases), types and amounts of additives, and composition of base materials and adhesives.

(b) *Test equipment*—(1) *Impact test frame and subframe.* (See figures 1, 2, 3, and 4.) (i) The impact test frame shall be constructed to minimize movement and deflection of its members during testing. For this purpose, the structural framing and bracing members shall be steel angles 3 inches by 5 inches by $\frac{1}{4}$ inch (7.7 centimeters by 12.7 centimeters by 0.7 centimeters) or other sections and materials of equal or greater rigidity.

(ii) The structural framing shall be welded or securely bolted at the corners and braced by one of the alternate methods shown in figure 1 and shall be securely bolted to the floor.

(iii) The subframe for securing the test specimen on all four edges shall be reinforced at each corner. The material is shown as wood in figure 3, but other materials may be used provided the test specimen will contact only the neoprene strips.

(iv) Any reasonable means may be used to secure the subframe to the test frame so long as the mounting is secure and the pressure on the glazing in the subframe is not significantly altered when the subframe is removed.

(v) Pressures on the test specimen shall be controlled, and the compression of the neoprene strips shall be between 10 and 15 percent of the original thickness of the neoprene. Securing methods such as wing bolts and clamps shall be uniformly spaced no greater than 18 inches (45 centimeters) apart with no fewer than two

on any edge. To limit the compression of the neoprene and prevent distortion of the subframe, metal shims of an appropriate thickness shall be used as shown in figures 3 and 4.

(2) *Impactor.* (i) The impactor shall be a leather punching bag as shown in figure 5 of this section. The bag shall be filled with No. 7½ chilled lead shot to a total weight of completed assembly before taping, as shown in figure 5, of 100 pounds ± 4 ounces (45.36 ± 0.11 kilograms). The rubber bladder shall be left in place and filled through a hole cut into the upper part. After filling the rubber bladder, the top should be either twisted around the threaded metal rod below the metal sleeve or pulled over the metal sleeve and tied with a cord or leather thong. Note that the hanging strap must be removed. The bag should be laced in the normal manner. The exterior of the bag shall be completely covered by ½ inch (1.3 centimeters) wide glass filament reinforced pressure sensitive tape. (Figure 5).

(ii) The impactor shall be supported as shown in figure 2. Provisions shall be made for raising the impactor to drop heights of up to 48 inches (1.22 meters). At its release it shall have been supported so that the pin going through its center was in line with the steel cable. The impactor shall not wobble or oscillate after its release.

(3) *Environmental durability test equipment—*(i) *Boil test.* Two containers of water shall be provided with means to maintain one at $150^\circ \pm 5^\circ \text{ F}$ ($66^\circ \pm 2^\circ \text{ C}$) and the second at a slow boil at atmospheric pressure. The containers shall be large enough to accept a rack holding three specimens, each 12 inches (30 centimeters) square, of the glazing material in a vertical position. The rack shall be positioned so that each specimen is surrounded by at least one inch (2.5 centimeters) of water.

(ii) *Simulated weathering test.* The equipment shall be a xenon arc (water-cooled) Weather-Ometer employing a lamp rated at 6500 watts and automatic light monitoring and control systems. Borosilicate inner and outer filters shall be used. An appropriate water spray cycle shall be used. Operating procedures shall be in accordance with ASTM G 26-70, "Standard Recommended Practice for Operating Light- and Water-Exposure Apparatus (Xenon-Arc Type) for Exposure of Nonmetallic Materials," April 13, 1970, as augmented for plastics by ASTM D 2565-70, "Standard Recommended Practice for Operating Xenon-Arc Type (Water-Cooled) Light- and Water-Exposure Apparatus for Exposure of Plastics," Procedure B, June 12, 1970.

[1446] (iii) *Indoor aging test.* A test chamber large enough to contain four specimens of size used in the impact test (see paragraph (c) (2) of this section) shall be used. Hangers shall be provided to support the specimens vertically with a minimum of 4 inches (11 centimeters) of separation for air circulation. The chamber shall be capable of maintaining 140° F (60° C) at 95 percent relative humidity during testing.

(c) *Test specimens—*(1) *Condition of specimens.* All specimens shall be tested as supplied by the manufacturer, following removal of any temporary protective masking materials. No tests shall be commenced before the specimens have been stored in the laboratory for 4 hours. Specimens shall be arranged to permit free circulation of air to all surfaces during this period.

(2) *Impact specimens.* Impact specimens shall be of the largest size manufactured up to a maximum width of 34 inches (86 centimeters) and a maximum height of 76 inches (1.9 meters). Specimens shall be tested for each nominal thickness offered by the manufacturer.

(3) *Environmental durability specimens—*(i) *Boil test.* Three pieces 12 inches by 12 inches (30 centimeters

by 30 centimeters) with nominal thickness identical to those submitted for the impact test shall be used.

(ii) *Weathering tests*—(A) *Plastics*. Not less than 10 plastic specimens $\frac{1}{2}$ inches by 5 inches (1.3 centimeters by 12.7 centimeters) by nominal thickness identical to those submitted for the impact test shall be used.

(B) *Organic-coated glass*—(1) *Orientation specified*. Six organic-coated glass specimens 2 inches by 6 inches (5 centimeters by 15 centimeters) by nominal thickness identical to those submitted for the impact test shall be used.

(2) *Orientation unspecified*. Nine organic-coated glass specimens, 2 inches by 6 inches (5 centimeters by 15 centimeters) by nominal thickness identical to those submitted for the impact test shall be used except that when the glazing material is symmetric across its thickness, six specimens may be used.

(iii) *Indoor service*. Four additional samples identical to those submitted for the impact test.

(d) *Test procedures*—(1) *Impact test procedure*. Each specimen shall be struck within 2 inches (5 centimeters) of its geometric center with the impactor dropped from a single height, designated according to the product category. Specimens for Category I shall be impacted one time from a drop height of 18 to 18½ inches (458 to 470 millimeters). Specimens for Category II shall be impacted one time from drop of 48 to 48½ inches (1.22 to 1.23 meters). For all specimens that are not symmetric from surface to surface, an equal number of specimens shall be impacted on each side. For glazing materials which will be evaluated by paragraph (e) (1) (iii) of this section, this impact test procedure is not required.

(2) *Environmental durability test procedures*—(i) *Boil test*. The specimens shall be immersed in the 150° F (66° C) water for 3 minutes. They shall then be quickly removed and immersed in the boiling water and left there for 2 hours. The specimens shall then be removed, cooled, and dried for examination as specified in § 1201.4(e) (2) (i) of this standard.

(ii) *Accelerated weathering test*. The specimens shall be retained in the Weather-Ometer (paragraph (b) (3) (ii) of this section) for a period of 1200±1 hours, and exposed to a radiant flux of 50 microwatts per square centimeter (12 calories per second per square centimeter) while monitoring at a wavelength of 340 nanometers.

(A) *Plastics*. Five of the specimens shall be exposed to radiation and five shall be kept in darkness at 73° F (23° C) for use as controls.

(B) *Organic-coated glass*—(1) *Orientation specified*. Three specimens shall be mounted with the surface that is intended to be oriented indoors faced away from the radiation source; the other three specimens shall be kept in darkness at 73° F (23° C) for use as controls. Materials so tested shall be labeled according to § 1201.5(c) of this Part 1201.

(2) *Orientation unspecified*. Three specimens shall be mounted with one of the surfaces toward the radiation; three specimens shall be mounted with the other surface toward the radiation, and three specimens shall be kept in darkness at 73° F (23° C) for use as controls. When the glazing material is symmetric across its thickness, three specimens shall be irradiated.

(iii) *Indoor aging test*. The specimens shall be hung in the test chamber for 10 complete cycles (480 hours). The procedure shall be in accordance with procedure A of ASTM D 756-56, "Test for Resistance of Plastics to Accelerated Service Conditioning," September 10, 1956,

(Reapproved 1971) except that during the humid phase of the cycle the relative humidity shall be maintained at 95 percent.

(e) *Interpretation of results*—(1) *Impact test*. A glazing material may be qualified for use in both Category I and Category II products if it meets the impact requirements for Category II. A glazing material shall be judged to pass the impact test if the specimen tested meets any one of the criteria listed in paragraphs (e) (1) (i) through (v) of this section:

(i) When breakage occurs (numerous cracks and fissures may occur) no opening shall develop in the test sample through which a 3 inch (76 millimeter) diameter solid steel sphere, weighing 4 pounds ± 3 oz. (1.81 \pm 0.08 kilograms), passes when placed (not dropped) in the opening and permitted to remain for a period of one second. For this criterion, the sample after being impacted shall be placed, while remaining in the subframe, in a horizontal, impact side up position with a minimum of one foot (31 centimeters) of free space immediately beneath the specimen.

(ii) When breakage occurs, what appear to be the 10 largest particles shall be selected within 5 minutes subsequent to the test and shall weigh no more than the equivalent weight of 10 square inches (64 centimeters) of the original specimen. For the purposes of this section "particle" means a portion of a broken test specimen which is determined by identifying the smallest possible perimeter around all points in the portion of the broken test specimen, always passing along cracks or exposed surfaces.

(iii) The specimen has:

(A) a modulus of elasticity less than 750,000 psi (5,170 megapascal) when measured by ASTM D 790-71,

"Standard Method of Test for Flexural Properties of Plastics," October 29, 1971, and

(B) a Rockwell hardness (M or R scale) less than 140 when measured by ASTM D 785-65 (Reapproved 1970), "Standard Method of Test for Rockwell Hardness of Plastics and Electrical Insulating Materials," August 31, 1965.

(iv) The specimen does not remain within the subframe and no breakage is caused by the impactor.

(v) The specimen does not break.

(2) *Environmental durability tests*—(i) *Boil test*. The glass itself may crack in this test, but no bubbles or other defects shall develop more than $\frac{1}{2}$ inch (12 millimeters) from the outer edge of the specimen or from any crack that may develop. Any specimen in which the glass cracks to an extent that confuses the interpretation of the results shall be discarded, and another specimen shall be tested in its stead.

(ii) *Accelerated weathering test*—(A) *Plastics*. (1) Plastic specimens shall be evaluated before and after exposure as described in Method B, "Simple Beam (Charpy-Type) Test," of ASTM D 256-73, "Test for Impact Resistance of Plastics and Electrical Insulating Materials," November 27, 1973. The exposed specimens shall be tested with the exposed surface subjected to tension. In the case of thin materials, the span of the specimens shall be reduced to 2 inches (50 millimeters) to avoid having the specimens bend enough to slip between the supports without breaking. For materials that will not break on this 2 inch (50 millimeters) span the specimens shall be notched across the $\frac{1}{2}$ inch (12 millimeters) surface prior to exposure. The notch shall be a 45 degree angle and the radius at the bottom shall be 0.010 \pm 0.002 inch (0.25 \pm 0.04 millimeters). The thickness of the material beneath the notch shall be uniform

within ± 0.002 inch (± 0.05 millimeters) for all specimens and shall not be less than 70 percent of the specimen thickness. During exposure the notch shall face the radiation source.

(2) Plastic materials shall be acceptable if the impact strength is not reduced by more than 25 percent during exposure. Some discoloration is permissible, but defects other than this discoloration shall not be permissible. No bubbles or other noticeable decomposition shall be permissible in the irradiated portion.

(B) *Organic-coated glass.* Specimens shall be judged satisfactory if they pass both the adhesion test and the tensile test described below in paragraph (e) (ii) (B) (1) and (2) of this section.

[1447] (1) *Adhesion test (organic-coated glass only)*—

(i) The specimens for this test are the 2 inch by 6 inch (5 centimeters by 15 centimeters) weathered specimens and the control specimens. The specimens shall be conditioned just prior to the performance of the adhesion test at $73^{\circ} \pm 6^{\circ}$ F ($23^{\circ} \pm 3^{\circ}$ C) and 50 ± 5 percent relative humidity for 24 hours.

(ii) *Apparatus.* The test apparatus shall consist of a constant-rate-of-extension-type (CRE) tensile tester with the moving crosshead set to move at 12 inches per minute (5 millimeters per second) and load range such that the average pull force will fall at 30 to 50 percent of full scale. A cutter shall be used containing new razor blades for cutting 1 inch (25 millimeter) wide specimens of the organic coating on the glass. The razor blades shall be used one time only.

(iii) *Procedure.* Using the razor cutter, cut a straight, 1 inch (25 millimeter) wide strip of the organic coating in the lengthwise direction of the glass specimen along and within $\frac{1}{4}$ inch (6 millimeters) of one edge. Peel

back, cleanly and evenly, about 2 inches (50 millimeters) of one end of the 1 inch (25 millimeters) wide organic strip. Attach a strip of reinforced pressure sensitive tape to the side of the organic strip opposite the adhesive, to extend this free end to about 8 inches (200 millimeters) in length. Place the end of the glass panel from which the organic strip was removed in the lower clamp of the tensile tester and the free end of the tape in the upper clamp. Peel the remainder of the organic strip from the glass mechanically and obtain a record of the pull force value. Determine and record the average pull force value for each specimen from the chart. Weathered and control specimens are to be tested alternately.

(iv) *Interpretation of results.* The organic-coated glass adhesion shall be judged satisfactory if the average pull force for the weathered specimens is no less than 90 percent of the average pull force for the control specimens.

(2) *Tensile strength test (organic-coated glass only).*

(i) The specimens for this test are the same 2 inch by 6 inch (5 centimeter by 15 centimeter) specimens used in the adhesion test.

(ii) *Apparatus.* The CRE tensile tester shall be used with the moving crosshead set to move at 2 inches per minute (0.8 millimeter per second) and the load range such that the specimens will break at 30 to 60% of full scale. A cutter shall be used containing new razor blades for cutting $\frac{1}{2}$ inch (12 millimeter) wide specimens of the organic coating on the glass. The razor blades shall be used one time only.

(iii) *Procedure.* Using the $\frac{1}{2}$ inch (12 millimeter) razor cutter, cut a straight strip of the organic coating in the lengthwise direction of the glass specimen for the full 6 inch (15 centimeter) length. Carefully peel this strip from the glass panel and test it for breaking strength in the tensile tester.

(iv) *Interpretation of results.* The organic coating tensile strength shall be judged satisfactory if the average tensile value of the weathered specimens is no less than 75 percent of the average of the control specimens. Weathered and control specimens are to be tested alternately.

(C) *Plastic (indoor service).* Specimens shall be judged satisfactory if, after the indoor aging test (paragraph (d) (2) (iii) of this section), they again pass the impact test (paragraph (d) (1) of this section).

§ 1201.5 Certification and labeling requirements.

(a) Manufacturers and private labelers of glazing materials covered by this Part 1201 shall comply with the requirements of section 14 CPSA (15 U.S.C. 2063) and regulations issued under section 14.

(b) Any glazing material that for accelerated environmental durability tests meets only the requirements of § 1201.4(e) (2) (ii) (C) entitled "Plastic (indoor service)" shall bear the statement "INDOOR USE ONLY" as part of a permanent label.

(c) Organic-coated glass that has been tested for environmental exposure from one side only must bear a permanent label on the coating stating "GLAZE THIS SIDE IN" and shall bear in the central 50 percent of the surface area the following message in letters at least $\frac{1}{4}$ inch (7 millimeters) high: "SEE PERMANENT LABEL FOR IMPORTANT MOUNTING INSTRUCTION." The latter message shall be attached to either side of the glazing by any means which shall ensure the message will remain in place until installation.

§ 1201.6 Prohibited stockpiling.

(a) *Stockpiling.* For the purposes of this section, the term "stockpiling" means manufacturing or importing the affected products between the date of issuance of this Part 1201 in the FEDERAL REGISTER and the effective

date set out below in § 1201.7 at a rate significantly greater (prescribed in paragraph (b) of this section) than the rate at which the affected products were produced or imported during a base period (prescribed in paragraph (c) (2) of this section).

(b) *Prohibited acts.* Manufacturers and importers of glazing materials, fabricators, and manufacturers or importers of architectural products specified in § 1201.1(a) who incorporate glazing material shall not incorporate glazing materials which do not comply with the requirements of this Part 1201 into such products between the date of issuance of this Part 1201 in the FEDERAL REGISTER and the effective date set out in § 1201.7 below at a rate greater than the rate of production or importation during the base period (defined in paragraph (c) (2) of this section) plus ten percent. For wired glass used in doors or other assemblies subject to this Part 1201 and intended to retard the passage of fire, when such doors or other assemblies are required by a federal, state, local or municipal fire ordinance, the rate of production during the base period may be increased annually by no more than 10 percent.

(c) *Definitions.* As used in this § 1201.6:

(1) "Rate of production (or importation)" means the total number of affected architectural products incorporating glazing material not complying with this Part 1201 manufactured or imported during a stated base period.

(2) "Base period" means, at the option of the manufacturer or importer, any period of 180 consecutive days prior to January 6, 1977, said period to be selected within an interval which begins July 6, 1975.

§ 1201.7 Effective date.

The effective date of this Part 1201 shall be July 6, 1977; except that for glazing materials used in doors or

B98

other assemblies subject to this Part 1201 and intended to retard the passage of fire, when such doors or other assemblies are required by a federal, state, local or municipal fire ordinance, the effective date shall be January 6, 1980.

(Sec. 9(a), Pub. L. 92-573, 86 Stat. 1215; (15 U.S.C. 2058(a)))

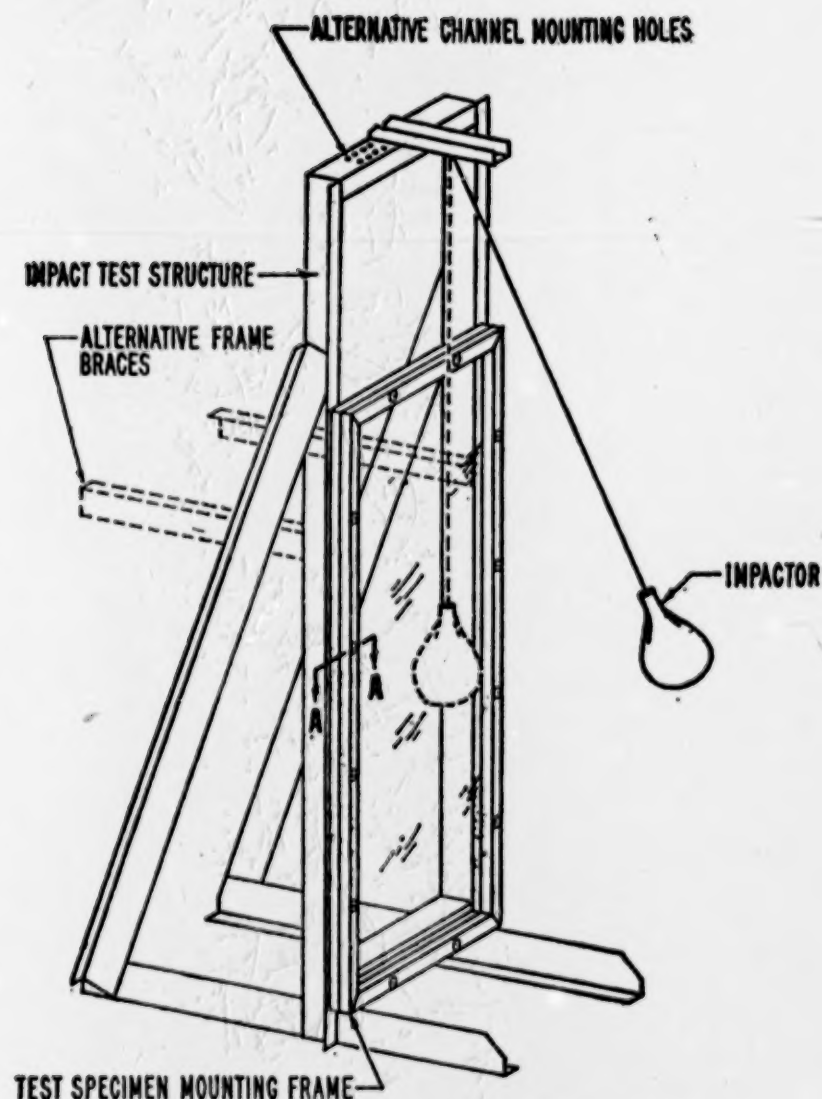
Dated: January 3, 1977.

SHELDON D. BUTTS.
*Acting Secretary, Consumer
Product Safety Commission.*

NOTE: Incorporation by reference provisions were approved by the Director of the Federal Register on December 30, 1976, and those materials are on file at the office of the Federal Register.

B99

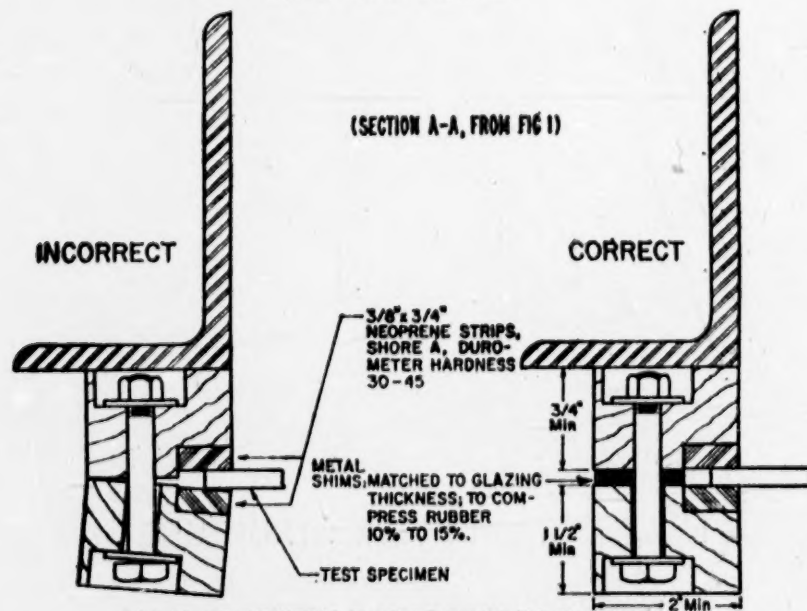
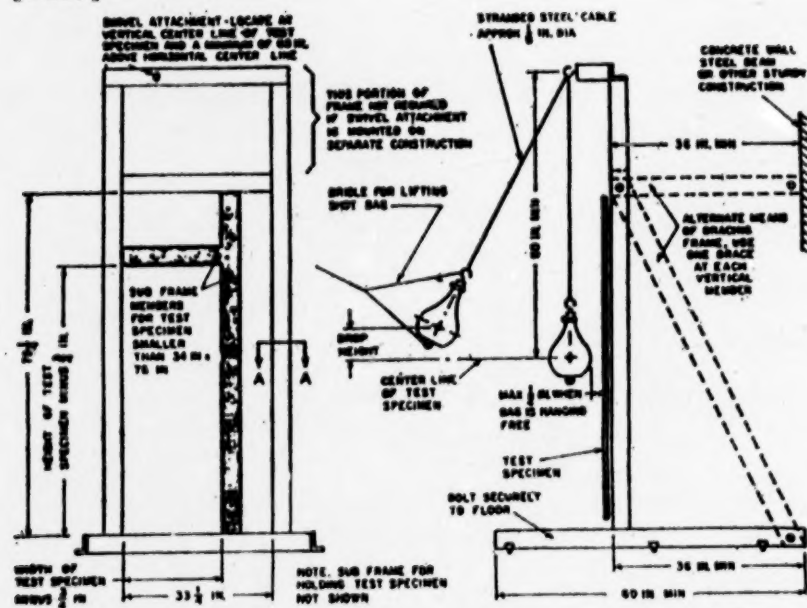
[1448]



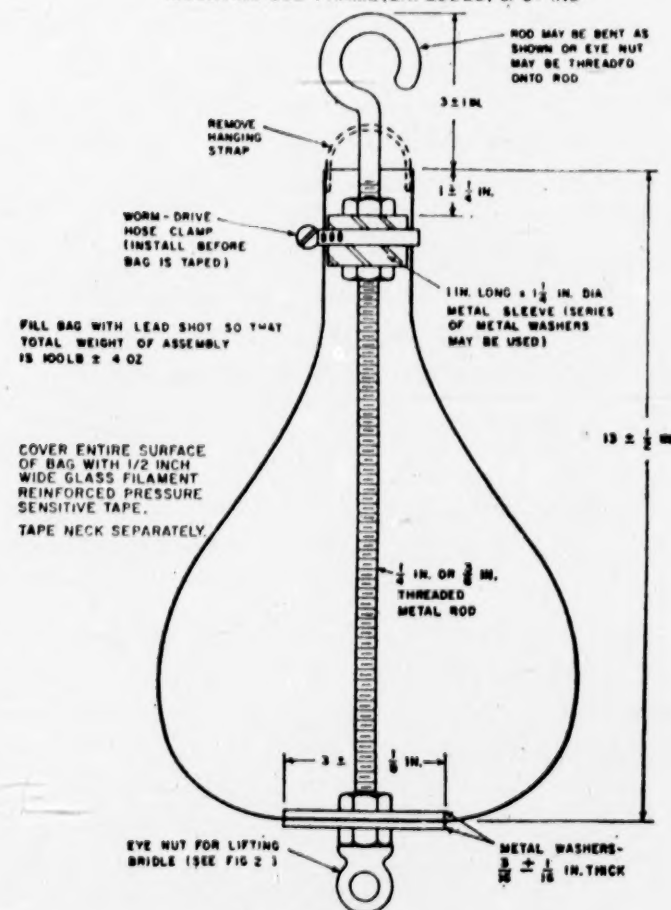
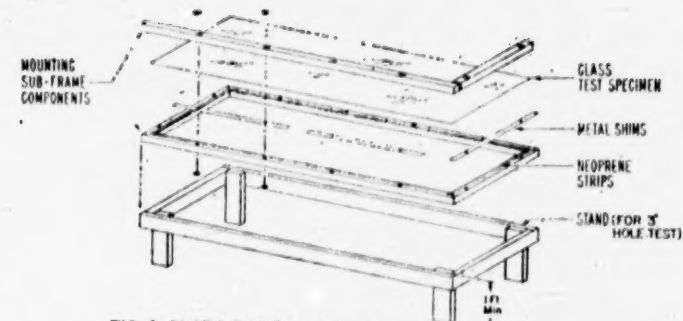
TEST SPECIMEN MOUNTING FRAME

FIG 1-GLASS IMPACT TEST STRUCTURE

B100



B101



[FN Doc.77-478 Filed 1-5-77;8:45 am]

APPENDIX C

CONSUMER PRODUCT SAFETY ACT,
15 U.S.C. § 2051 *et seq.*

§ 2052. Definitions

(a) For purposes of this chapter:

(1) The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—

(A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer,

(B)—(1) [Not applicable; relates to specific excluded articles.]

See sections 2079(d) and 2080 of this title, for limitations on Commission's authority to regulate certain consumer products.

(2) The term "consumer product safety rule" means a consumer products safety standard described in section 2056(a) of this title, or a rule under this chapter declaring a consumer product a banned hazardous product.

(3) The term "risk of injury" means a risk of death, personal injury, or serious or frequent illness.

(4)—(12) [Not relevant; related to other definitions.]

§ 2056. Consumer product safety standards—Types of requirements

(a) The Commission may by rule, in accordance with this section and section 2058 of this title, promulgate consumer product safety standards. A consumer product safety standard shall consist of one or more of any of the following types of requirements:

(1) Requirements as to performance, composition, contents, design, construction, finish, or packaging of a consumer product.

(2) Requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions.

Any requirement of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product. The requirements of such a standard (other than requirements relating to labeling, warnings, or instructions) shall, whenever feasible, be expressed in terms of performance requirements.

Proceedings for development of standards; notice;
development period

(b) A proceeding for the development of a consumer product safety standard under this chapter shall be commenced by the publication in the Federal Register of a notice which shall—

(1) identify the product and the nature of the risk of injury associated with the product;

(2) state the Commission's determination that a consumer product safety standard is necessary to eliminate or reduce the risk of injury;

(3) include information with respect to any existing standard known to the Commission which may be relevant to the proceeding; and

(4) include an invitation for any person, including any State or Federal agency (other than the Commission), within 30 days after the date of publication of the notice (A) to submit to the Commission an existing standard as the proposed consumer product safety standard or (B) to offer to develop the proposed consumer product safety standard.

An invitation under paragraph (4) (B) shall specify a period of time, during which the standard is to be developed, which shall be a period ending 150 days after the publication of the notice, unless the Commission for good cause finds (and includes such finding in the notice) that a different period is appropriate.

(c)—(f) [Not relevant; relates to other procedures.]

§ 2058. Administrative procedure governing promulgation of consumer product safety rules—Promulgation; withdrawal of notice of proceeding

(a) (1) Within 60 days after the publication under section 2056(c), (e) (1), or (f) of this title or section 2057 of this title of a proposed consumer product safety rule respecting a risk of injury associated with a consumer product, the Commission shall—

(A) promulgate a consumer product safety rule respecting the risk of injury associated with such product if it makes the findings required under subsection (c) of this section, or

(B) withdraw by rule the applicable notice of proceeding if it determines that such rule is not (i) reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product, or (ii) in the public interest;

except that the Commission may extend such 60-day period for good cause shown (if it publishes its reasons therefor in the Federal Register).

(2) Consumer product safety rules which have been proposed under section 2056(c), (e)(1), or (f) of this title or section 2057 of this title shall be promulgated pursuant to section 553 of Title 5, except that the Commission shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

Expression of risk of injury which standard is designed to eliminate or reduce

(b) A consumer product safety rule shall express in the rule itself the risk of injury which the standard is designed to eliminate or reduce. In promulgating such a rule the Commission shall consider relevant available product data including the results of research, development, testing, and investigation activities conducted generally and pursuant to this chapter.

Findings for inclusion in rules; required findings

(c)(1) Prior to promulgating a consumer product safety rule, the Commission shall consider, and shall make appropriate findings for inclusion in such rule with respect to—

(A) the degree and nature of the risk of injury the rule is designed to eliminate or reduce;

(B) the approximate number of consumer products, or types or classes thereof, subject to such rule;

(C) the need of the public for the consumer products subject to such rule, and the probable effect of

such rule upon the utility, cost, or availability of such products to meet such need; and

(D) any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety.

(2) The Commission shall not promulgate a consumer product safety rule unless it finds (and includes such finding in the rule)—

(A) that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product;

(B) that the promulgation of the rule is in the public interest; and

(C) in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product.

(d) and (e) [Not relevant; relates to other procedures.]

§ 2060. Judicial review of consumer product safety rules—Petition by persons adversely affected, consumers, or consumer organizations

(a) Not later than 60 days after a consumer product safety rule is promulgated by the Commission, any person adversely affected by such rule, or any consumer or consumer organization, may file a petition with the United States court of appeals for the District of Columbia or for the circuit in which such person, consumer, or organization resides or has his principal place of business for

judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose and to the Attorney General. The Commission shall transmit to the Attorney General, who shall file in the court, the record of the proceedings on which the Commission based its rule, as provided in section 2112 of Title 28. For purposes of this section, the term "record" means such consumer product safety rule; any notice or proposal published pursuant to section 2056, 2057, or 2058 of this title; the transcript required by section 2058(a)(2) of this title of any oral presentation; any written submission of interested parties; and any other information which the Commission considers relevant to such rule.

Additional data, views, or arguments

(b) If the petitioner applies to the court for leave to adduce additional data, views, or arguments and shows to the satisfaction of the court that such additional data, views, or arguments are material and that there were reasonable grounds for the petitioner's failure to adduce such data, views, or arguments in the proceeding before the Commission, the court may order the Commission to provide additional opportunity for the oral presentation of data, views, or arguments and for written submissions. The Commission may modify its findings, or make new findings by reason of the additional data, views, or arguments so taken and shall file such modified or new findings, and its recommendation, if any, for the modification or setting aside of its original rule, with the return of such additional data, views, or arguments.

Jurisdiction; substantial evidence to support administrative findings

(c) Upon the filing of the petition under subsection (a) of this section the court shall have jurisdiction to

review the consumer product safety rule in accordance with chapter 7 of Title 5, and to grant appropriate relief, including interim relief, as provided in such chapter. The consumer product safety rule shall not be affirmed unless the Commission's findings under section 2058(c) of this title are supported by substantial evidence on the record taken as a whole.

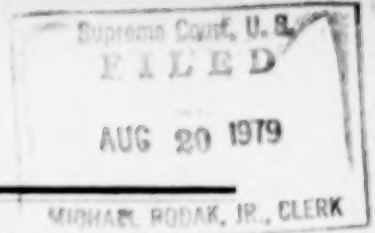
Supreme Court review

(d) The judgment of the court affirming or setting aside, in whole or in part, any consumer product safety rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

Availability of other remedies

(e) The remedies provided for in this section shall be in addition to and not in lieu of any other remedies provided by law.

No. 79-20



In the Supreme Court of the United States

OCTOBER TERM, 1978

FLAT GLASS ASSOCIATION OF JAPAN, ET AL.,
PETITIONERS

v.

CONSUMER PRODUCT SAFETY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF FOR THE CONSUMER PRODUCT
SAFETY COMMISSION IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SIENEFIELD
Assistant Attorney General

ROBERT B. NICHOLSON
ANDREA LIMMER
Attorneys
Department of Justice
Washington, D.C. 20530

ANDREW S. KRULWICH
General Counsel

ALAN H. SCHOEM
Attorney
Consumer Product Safety Commission
Washington, D.C. 20207

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutory provision	2
Statement	2
Argument	5
Conclusion	11

CITATIONS

Cases:

<i>American Petroleum Institute v. OSHA</i> , 581 F. 2d 493, cert. granted, Nos. 78-911 and 78-1036 (Feb. 20, 1979)	8
<i>Aqua Slide 'N' Dive Corp. v. CPSC</i> , 569 F. 2d 831	8
<i>D. D. Bean & Sons v. CPSC</i> , 574 F. 2d 643	8
<i>CPSC v. Anaconda Co.</i> , 593 F. 2d 1314	6, 8
<i>Davis v. United States</i> , 417 U.S. 333	6
<i>Kaiser Aluminum & Chemical Corp. v.</i> <i>CPSC</i> , 428 F. Supp. 177, rev'd, 574 F. 2d 178, cert. denied, No. 77-1826 (Oct. 3, 1978)	4, 7-8
<i>Mobil Oil Corp. v. FPC</i> , 417 U.S. 283	10
<i>National Railroad Passenger Corp. v.</i> <i>National Ass'n of Railroad Passengers</i> , 414 U.S. 453	6
<i>Tennessee Valley Authority v. Hill</i> , 437 U.S. 153	6

Cases—(Continued):

<i>United States v. Johnston</i> , 268 U.S. 220	10
<i>United States v. Lovasco</i> , 431 U.S. 783	6
<i>United States v. Tucker Truck Lines</i> , 344 U.S. 33	6
<i>Wisniewski v. United States</i> , 353 U.S. 901	6

Statutes and regulations:

Consumer Product Safety Act, 15 U.S.C.
2051 *et seq.*:

Section 3(a), 15 U.S.C. 2052(a)	2, 4, 8
Section 3(a)(1)(A)-(I), 15 U.S.C. 2052(a)(1)(A)-(I)	8
Section 7, 15 U.S.C. 2056	2
Section 9, 15 U.S.C. 2058	2
Section 9(b), 15 U.S.C. 2058(b)	6
Section 9(c), 15 U.S.C. 2058(c)	5, 6
Section 9(c)(2), 15 U.S.C. 2058(c)(2)	8, 9
Section 11, 15 U.S.C. 2060	2, 4
Section 11(b), 15 U.S.C. 2060(b)	4
Section 11(c), 15 U.S.C. 2060(c)	8

16 C.F.R. 1201 <i>et seq.</i>	3
-------------------------------------	---

Miscellaneous:

118 Cong. Rec. (1972):

p. 31378	8
p. 31382	8

Miscellaneous—(Continued):

42 Fed. Reg. (1977):

pp. 31164, 31166	3
pp. 61859, 61860	3
43 Fed. Reg. 57244 (1978)	3
44 Fed. Reg. 31208, 31221 (1979)	3
H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. (1972)	8

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-20

FLAT GLASS ASSOCIATION OF JAPAN, ET AL.,
PETITIONERS

v.

CONSUMER PRODUCT SAFETY COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE CONSUMER PRODUCT
SAFETY COMMISSION IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28)¹ is reported at 593 F. 2d 1323. The safety standard with supporting findings promulgated by the Consumer Product Safety Commission (Pet. App. B1-B101), is published at 42 Fed. Reg. 1427 (1977).

¹"Pet." refers to the petition for a writ of certiorari; "Pet. App." refers to the appendix to the petition; "JA" refers to the appendix filed in the court of appeals; "C.A. Br." refers to petitioners' opening brief filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1979. A timely petition for rehearing was denied on April 6, 1979. The petition for a writ of certiorari was filed on July 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly reviewed the entire record before the Commission to determine that the Commission was correct in asserting jurisdiction to promulgate a consumer product safety standard for architectural glazing materials.

2. Whether the court of appeals correctly held that, to the extent wired glass exhibits no significant dissimilarity of function or risk when compared to other architectural glazing materials, the findings articulated by the Commission under Section 9(c) of the Act with respect to application of the standard to architectural glazing materials justify application of the standard to wired glass.

STATUTORY PROVISIONS

Sections 3(a), 7, 9, and 11 of the Consumer Product Safety Act ("the Act"), 15 U.S.C. 2052(a), 2056, 2058, and 2060, are printed at Pet. App. C1-C7.

STATEMENT

1. On May 28, 1974, the Consumer Product Safety Commission began a proceeding under Section 7 of the Consumer Product Safety Act, 15 U.S.C. 2056, to develop a consumer product safety standard for architectural glass (Pet. App. B4). It published a proposed standard on February 11, 1976,² and invited comments pursuant to Sections 7 and 9 of the Act, 15 U.S.C. 2056 and 2058

(Pet. App. B5). Along with numerous others, petitioner Flat Glass Association of Japan filed comments on the proposed standard. It recommended that wired glass used in fire doors be exempt from the standard, or, in the alternative, that it be tested at a lower impact level than that proposed (Pet. App. B10-B11, B14-B16). The Association did not claim that architectural glass in general or wired glass in particular are not "consumer products" as defined in the Act and that the Commission therefore lacked jurisdiction to develop a consumer product safety standard for them.

On January 6, 1977, the Commission issued a final safety standard for architectural glazing materials including wired glass (Pet. App. B1-B101).² Under the final standard, glazing materials used in fire doors come within a less stringent testing category than that originally proposed (Pet. App. B16).³ Responding to the specific concerns of the only party to voice a jurisdictional objection, the Commission also stated that architectural glazing materials are produced or distributed "for sale to and/or use or enjoyment of consumers in or around a

²After publishing the proposed standard, the Commission decided to use the term "architectural glazing materials" instead of "architectural glass" because some of the products to be included were made of materials other than glass (Pet. App. B4). The final standard challenged by petitioners in this case was later amended in ways that did not moot the issues (42 Fed. Reg. 31164, 31166; 61859, 61860 (1977); 43 Fed. Reg. 57244 (1978); 44 Fed. Reg. 31208, 31221 (1979). The standard as amended is now published at 16 C.F.R. 1201 *et seq.* (1979).

³In addition, the Commission deferred the effective date of the standard for wired glass used in doors or other assemblies to retard the passage of fire, where such glass was required by federal or local fire ordinance, in order to permit the development of the necessary technology to meet the requirements of both the fire codes and the consumer product safety standard (Pet. App. B14-B15).

* * * household or residence, a school, in recreation, or otherwise" and thus are within its jurisdiction (Pet. App. B62-B63).

Petitioners sought review of the safety standard in the court of appeals, pursuant to Section 11 of the Act, 15 U.S.C. 2060. Although they had not raised the issue before the Commission, petitioners argued in the court of appeals that, under Section 3(a) of the Act, the Commission lacked jurisdiction over architectural glazing materials because they are building components whose regulation is preempted by state and local housing codes.⁴ They stated that the issue of coverage "does not involve an issue of fact or administrative discretion, but of law" (C.A. Br. 11). They did not seek leave, as they could have under Section 11(b), 15 U.S.C. 2060(b), to present to the Commission additional data, views, or arguments on the jurisdictional question. And, while they challenged the evidence supporting the Commission's substantive findings, petitioners did not claim any procedural infirmity in the rulemaking by which the standard was promulgated (Pet. App. A2-A3).

2. The court of appeals held that architectural glazing materials, including wired glass, fall within the Act's definition of "consumer product," stating (Pet. App. A8 (footnote omitted)):

The record before the court substantiates that the products covered by the safety standard are customarily marketed as distinct articles of commerce

⁴This argument was based on a district court holding that was subsequently overturned by the United States Court of Appeals for the Third Circuit. *Kaiser Aluminum & Chemical Corp. v. CPSC*, 428 F. Supp. 177 (D.Del. 1977), rev'd, 574 F. 2d 178 (3d Cir.), cert. denied, No. 77-1826 (Oct. 3, 1978) (see C.A. Br. 12).

for sale to consumers or for use of consumers in or around a household or residence, a school, in recreation, or otherwise.

The court rejected petitioners' contention (see Pet. App. A26) that, under Section 9(c) of the Act, 15 U.S.C. 2058(c), which specifies the findings to be made by the Commission before it promulgates a consumer product safety rule,⁵ the Commission was obligated to make a complete set of particularized findings for wired glass, in addition to the findings it made for architectural glazing materials as a class. The court held that, to the extent wired glass was properly included in the category of architectural glazing materials, the findings for the larger product category were sufficient if supported by substantial evidence on the record as a whole. The court remanded the case to the Commission for further consideration whether, with respect to certain product uses, unique characteristics of wired glass are sufficiently dissimilar to those of other materials in the covered product class to warrant exclusions from some portions of the standard (Pet. App. A15-A23); but the court otherwise upheld the standard as meeting the requirements of the Act (*id.* at A25-A26).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant review by this Court.

I. Petitioners' claim that the Commission failed to marshal facts to support its jurisdictional determination (Pet. 8-11) is insubstantial. Since petitioners had a chance to raise this point before the agency and the court of

⁵Section 9(c) of the Act is reprinted at Pet. App. C4-C5.

appeals but did not do so, they are foreclosed from arguing it here. *United States v. Lovasco*, 431 U.S. 783, 788 n. 7 (1977); *United States v. Tucker Truck Lines*, 344 U.S. 33 (1952).⁶ In any event, the contention is unsound. The statute does not, as petitioners suggest (Pet. 4), require the Commission to make jurisdictional findings either within "the four corners of the standard" itself or in the preamble to the standard. Indeed, the fact that Congress expressly enumerated in Section 9 of the Act certain findings that the Commission must include in any safety standard, but did not include jurisdictional findings among them, is powerful evidence that Congress saw no need for the express findings petitioners argue for here. 15 U.S.C. 2058(b)-(c). See *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978).⁷

⁶Indeed, at the agency level petitioners did not even contest the Commission's jurisdiction, let alone demand detailed jurisdictional findings. Another party did question the Commission's jurisdiction, and the Commission expressly found that it has jurisdiction (Pet. App. B62-B63).

⁷Petitioners claim (Pet. 9) that the decision here is inconsistent on this point with *CPSC v. Anaconda Co.*, 593 F. 2d 1314 (D.C. Cir. 1979), decided the same day by the same panel. Even if the claim had some basis, it would show no more than a conflict within a single circuit, a matter that does not warrant resolution by this Court. Cf. *Davis v. United States*, 417 U.S. 333, 340 (1974); *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). The claim is, in fact, groundless. *Anaconda* was an action brought by the Commission against manufacturers of aluminum wiring under Section 12 of the Act. There was no agency record to review. In the present case the agency compiled a full record that adequately sustained its jurisdiction. See note 8, *infra*.

The court of appeals nonetheless canvassed the entire agency record to determine whether, as petitioner had alleged, the Commission's assertion of jurisdiction was unauthorized. The court's conclusion that the Commission correctly determined that architectural glazing materials are consumer products, and that it accordingly had jurisdiction to promulgate a safety standard for them, is substantiated by the record, and further review of that factual assessment is unwarranted.⁸

Petitioners' suggestion that, as a matter of law, "building components" are outside the Act's definition of "consumer product" (Pet. 10) is groundless. The only courts of appeals to have spoken on the question have taken a contrary view. *Kaiser Aluminum & Chemical Corp. v. CPSC*, 574 F. 2d 178 (3d Cir.), cert. denied, No. 77-1826 (Oct. 3, 1978); *CPSC v. Anaconda Co.*, 593 F. 2d 1314, 1321 (D. C. Cir. 1979) (dictum). A "consumer product" is defined by the Act, Section 3(a), 15 U.S.C. 2052(a), as one that is produced or distributed for sale to or for the use, consumption, or enjoyment of a consumer. There is no statutory exemption for building materials or components, although other express statutory exclusions are written into the Act. 15 U.S.C. 2052(a)(1)(A)-(I); see H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 27-28 (1972). And, in fact, architectural glass was expressly cited as a target of concern when Congress debated the need for this legislation. See 118 Cong. Rec. 31378 (1972) (remarks of Rep. Moss); 118 Cong. Rec. 31382 (1972) (remarks of Rep. Carney).

⁸As the court observed (Pet. App. A8 n.18) the record contains a study indicating that finished architectural glazing products are sold as distinct articles to lumber yards, hardware stores, retail stores, and building material dealers for use in the replacement and remodeling, as well as the home building, markets (J.A. 58a-58c). Contrary to petitioners' assertion (Pet. 5), the study expressly included wired glass among the several architectural glass products surveyed (J.A. 58f).

2. Contrary to petitioners' contention (Pet. 11-14), the decision in this case does not conflict with decisions of the First and Fifth Circuits regarding the requisite record support for Commission finding, under Section 9(c)(2) of the Act, 15 U.S.C. 2058(c)(2), that a standard is "reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with [the] product [subject to the standard]." In *D.D. Bean & Sons v. CPSC*, 574 F. 2d 643 (1978), and *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F. 2d 831 (1978), the First and Fifth Circuits, respectively, held that, under Section 11(c) of the Act, 15 U.S.C. 2060(c), which mandates a substantial evidence standard of judicial review for the Commission's findings under Section 9(c) of the Act, a reviewing court must find substantial evidence on the record as a whole that each one of a standard's requirements is reasonably necessary within the meaning of Section 9(c)(2) in order to uphold each requirement.⁹ The court of appeals in the present case applied that substantial evidence test to all of the Commission's findings with respect to the standard for architectural glazing materials (Pet. App. A26), and petitioners do not, in fact, contend that the court erred in upholding all of the standard's requirements as applied to materials other than wired glass included in that product category.

⁹In *American Petroleum Institute v. OSHA*, 581 F. 2d 493 (5th Cir. 1978), cert. granted, Nos. 78-911 and 78-1036 (Feb. 20, 1979), also relied on by petitioners (Pet. 12-13), the Fifth Circuit applied its *Aqua Slide* test in overturning a standard for occupational exposure to benzene promulgated under the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.* Whether that test may properly be applied to OSHA standards is, of course, not an issue in this case.

Petitioners' contention is essentially that because wired glass is different in some respects from other types of architectural glazing materials, the Commission was required to make a complete set of separate findings for wired glass under Section 9(c)(2) of the Act, to be separately reviewed by the court under the substantial evidence test. As the court of appeals correctly recognized, this amounts to an argument that the Commission cannot treat a range of similar products as a single product class for the purpose of promulgating a standard; and the court properly rejected the argument since, if the Commission lacked such authority, "products of nearly identical design, composition and function" would have to be treated individually, with the result that the Commission "would find itself entangled in needlessly repetitive investigation, rulemaking and adjudication" (Pet. App. A12).

The court acknowledged that to the degree that functional and risk characteristics of a particular product within the class subject to the standard differ significantly from those characteristics of other members of the product class, some variations in the standard's applicability may be warranted (Pet. App. A13-A14). Indeed, the Commission itself had recognized that differences between wired glass and other types of architectural glazing materials justified some differences in the applicability of the standard (Pet. App. A69); and the court ordered a partial remand so that the Commission could determine whether certain unique characteristics of wired glass might warrant some

additional exclusions (Pet. App. A14-A23).¹⁰ With those exceptions the court held that the findings made by the Commission as a predicate for its issuance of the safety standard for architectural glazing materials, including wired glass (Pet. App. B70-B78), were supported by substantial evidence on the record as a whole (*id.* at A25-A26). As noted above, this is the proper standard of review. A challenge to such an assessment of an agency's findings does not warrant review by this Court. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309-310 (1974); *United States v. Johnston*, 268 U.S. 220, 227 (1925).

¹⁰Petitioners had urged that wired glass be treated differently because (1) it has dissimilar breakage characteristics, (2) it has higher visibility than clear glass, thus reducing the risk of inadvertent collision, and (3) it exhibits unique functional advantages when used in fire doors (Pet. App. A12). Where the court found that these dissimilarities warranted a closer look for possible exemption for some product uses, it remanded the standard to the Commission for further findings (Pet. App. A15-A23). But to these extent that dissimilar characteristics of wired glass, such as breakage qualities, were irrelevant to the safety hazard posed, the inclusion of wired glass within the standard was properly upheld (Pet. App. A14-A15).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

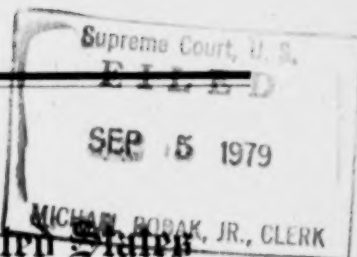
ROBERT B. NICHOLSON
ANDREA LIMMER
Attorneys

ANDREW S. KRULWICH
General Counsel

ALAN H. SCHOEM
Attorney
Consumer Product Safety Commission

AUGUST 1979

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979



No. 79-20

FLAT GLASS ASSOCIATION OF JAPAN, *et al.*,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

Of Counsel:

TURNER & TURNER
7101 Wisconsin Avenue
Washington, D.C. 20014

KIM D. MANN
7101 Wisconsin Avenue
Washington, D.C. 20014
Counsel for Petitioners

September 5, 1979

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-20

FLAT GLASS ASSOCIATION OF JAPAN, *et al.*,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

The Government, in its opposing brief, misstates crucial facts to bolster its argument that Supreme Court review is not warranted to examine the propriety of the lower court "finding" the jurisdictional facts necessary to sustain the order of the CPSC when the CPSC did not and could not make such findings on the agency record before it.

1. The Government argues (Res. Br. 5-6) in effect that petitioners are precluded from raising the jurisdictional issue before the Supreme Court because they did not raise it before the CPSC. A trade association composed of petitioners' commercial customers asked the CPSC to address this issue (JDA at 563-64).¹ Repeti-

¹ The Flat Glass Marketing Association, whose members wholesale, retail, and install wired glass purchased from petitioners,

tion would have served no useful purpose. Nevertheless, the Government never challenged the procedural posture of petitioners' argument at the Court of Appeals level, and that court accepted, considered, and discussed the argument in its opinion. 593 F.2d 1323, 1327-28 (Res. Br. App. A6-A8).

2. The Government implies (Res. Br. 4) petitioners can not complain about the ruling of the Court of Appeals on the jurisdictional findings question—whether the product is customarily sold or distributed to consumers²—because they neglected to request the opportunity to present additional evidence and argument to the Court pursuant to 15 U.S.C. § 2060(b). Additional argument and evidence were unnecessary. Petitioners' arguments on this issue were properly before the lower court; the record before the CPSC contained sufficient evidence to resolve the issue. The Court of Appeals ignored this record evidence, relying instead on a preliminary report that does not deal with the channels of distribution for wired glass.

3. The Government misrepresents (Res. Br. 7, n. 8) that the pivotal factual "finding" of the Court of Appeals rests on evidence derived from a study that specifically "surveyed" wired glass distribution. That so-called study is strictly a preliminary report. Its only mention of wired glass is a chart, labeled "Table 3," listing glass manufacturers "likely to produce flat glass products." A directory of glass manufacturers is stated as the source of this list. There is no hint of any survey conducted or even a suggestion wired glass is sold to consumers in any quantity through lumber yards, hardware and retail stores, or building materials dealers.

participated in the proceeding before the CPSC and raised several jurisdictional issues.

² The Court of Appeals ruled that its resolution of the jurisdictional issue hinged on this factual determination.

The only evidence of record on this point, contained in the *final* report prepared by the same outside firm, is to the contrary (JDA at 218-19). See Pet. Br. 5, n.8, and 11. The Court of Appeals not only ignored this conclusive evidence, but with respect to the non-supportive evidence it did cite, the Court had to indulge in factual assumptions presumably it would attribute to the CPSC and the agency record: (1) wired glass is included among the various types of glazing materials marketed through lumber yards, hardware and retail stores, and building materials dealers; (2) consumers in fact purchase wired glass from these sources of distribution; and (3) there is a "*significant marketing* of the product [through these sources] to consumers" (emphasis added) (see Pet. Br. App. A8). Nothing in the record supports any of these assumptions; each is patently false.

The inability of the Government to develop relevant arguments, bottomed on facts in the agency's record, to support the lower court's disposition of the jurisdictional dilemma only underscores the need for this Court to accord plenary review of the action below.

Respectfully submitted,

Of Counsel:

TURNERY & TURNERY

7101 Wisconsin Avenue

Washington, D.C. 20014

KIM D. MANN

7101 Wisconsin Avenue

Washington, D.C. 20014

Attorney for Petitioners

Flat Glass Association of Japan

Orient Glass, Inc.

Sentinel Enterprises, Inc.

Mitsubishi International

Corporation

Seaply Glass Corporation

Construction Imports, Inc.

Glasrep—

Glass International, Inc.

September 5, 1979